82-994

No. 82-

IN THE

Supreme Court of the United States

October Term, 1982

ROBERT WELCH, INC.,

Petitioner,

v.

ELMER GERTZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

QUESTIONS PRESENTED

Following remand from this Court, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and retrial in 1981, the United States Court of Appeals for the Seventh Circuit affirmed a judgment entered on a jury verdict by the United States District Court for the Northern District of Illinois for $100,000 in compensatory and $300,000 in punitive damages in this libel action brought by respondent Elmer Gertz against petitioner Robert Welch, Inc. This is the second largest unreversed jury verdict against a media defendant in a libel case decided after *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), in which appeals of right have been exhausted. The Court of Appeals concluded that the editor of petitioner's journal of conservative political opinion acted with reckless disregard of the truth because objectively he must have had "obvious reasons" to doubt the accuracy of the disputed article, which was authored by a freelance writer, and therefore should have investigated the article further. The "obvious reasons" which the Court of Appeals found to require further investigation were what it called the "unreasonable" political views of the freelance writer. The Court of Appeals imposed this duty of investigation even though subjectively the editor had confidence in the freelance writer and agreed with his views.

The following questions are presented:

1. Whether the decision below conflicts with decisions of this Court (including the prior decision in this case) by use of an objective rather than a subjective standard for a finding of actual malice thereby impermissibly burdening the expression of controversial political opinion in violation of the First Amendment.

2. Whether the decision below presents an important question of federal constitutional law which needs to be decided because it finds actual malice to be proven by attributing to the publisher a freelance writer's conduct without regard to the publisher's subjective awareness of falsity *vel non*.

3. Whether the decision below conflicts with decisions of this Court (including the prior decision in this case) and other

federal courts of appeals and state courts that expressions of political opinion, such as calling a person a "Marxist," "Leninist" or "Communist-fronter," are protected by the First Amendment and are not statements of fact subject to testing for falsity in a libel action.

4. Whether the decision below presents an important question of federal constitutional law because large awards of damages in libel actions, when as here they are unsupported by proof of injury to the plaintiff's reputation, unjustifiably inhibit First Amendment freedoms, so that recovery of damages for libel should be precluded absent proof of injury to reputation.

5. Whether the decision below conflicts with this Court's prior decision because the Court of Appeals allowed relitigation of the actual malice issue when it was the "law of the case" that petitioner did not act with actual malice.*

*Pursuant to Rule 28.1 the Petitioner states that Robert Welch, Inc., has no parent company nor any subsidiary or affiliate corporations.

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Robert Welch, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals on the remanded action is reported at 680 F.2d 527 (7th Cir. 1982) (App. 3a). The opinion of this Court reversing and remanding the first Court of Appeals opinion is reported at 418 U.S. 323 (1974). Earlier opinions are reported at 471 F.2d 801 (7th Cir. 1972) (App. 37a); 322 F. Supp. 997 (N.D. Ill. 1970); 306 F. Supp. 310 (N.D. Ill. 1969).

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1982. A timely petition for rehearing and suggestion for a

rehearing *in banc* was denied on September 15, 1982 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution reads in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

STATEMENT OF THE CASE

This is an action for libel which was tried to a jury in April, 1981, on remand from a decision of this Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) [hereinafter *Gertz I*]. The alleged libel was contained in a polemic 18-page article by a freelance writer, Alan Stang, entitled "Frame-Up – Richard Nuccio And The War On Police," which was published in the April, 1969, edition of *American Opinion*, a conservative journal of political opinion published by petitioner Robert Welch, Inc., a corporate affiliate of The John Birch Society.[1]

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[1]The Seventh Circuit in the first appeal stated:

> The article is 18 pages long. It is concerned with the trial and conviction of officer Nuccio for the crime of murdering a 17-year old boy named Nelson. The article is intended to persuade the reader that Nuccio was the victim of a "frame-up," and that the frame-up was part of a national conspiracy to discredit local police forces; the purpose of that conspiracy is to lay the groundwork for the creation of a national police force, which, in turn, is a step toward a totalitarian state.
>
> The article purports to analyze the evidence against Nuccio so incisively that the falsity of several witnesses' testimony at Nuccio's trial, and the error of the trial judge's finding of guilt, will be manifest to the reader.

Gertz v. Robert Welch, Inc., 471 F.2d 801, 803-04 (7th Cir. 1972) (footnote omitted) (Stevens, J.) (App. 40a-41a).

This case, which was brought under diversity of citizenship jurisdiction, was originally tried to a jury in September, 1970. That jury returned a verdict in favor of the respondent for $50,000.

In the initial trial "[a]ll issues were withdrawn from the jury except the proper measure of damages." *Gertz v. Robert Welch, Inc.*, 322 F. Supp. 997, 998 (N.D. Ill. 1970). The District Court granted the petitioner's motion for judgment notwithstanding the verdict, holding that the article concerned a matter of public interest and Mr. Gertz had failed to prove that the petitioner acted with the requisite degree of "actual malice" required by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *Gertz v. Robert Welch, Inc., supra*, 322 F. Supp. at 999.

On appeal to the Seventh Circuit, in an opinion by then Circuit Judge Stevens, the District Court was affirmed, holding that there was no evidence that the petitioner had acted with actual malice as is required under *New York Times, supra. Gertz v. Robert Welch, Inc.*, 471 F.2d 801, 807 (7th Cir. 1972) (App. 47a).[2]

On review, this Court agreed with the lower courts that Mr. Gertz had failed to prove that the petitioner acted with actual malice. *Gertz I, supra*, 418 U.S. at 331-32. It reversed and remanded the case for a new trial, however, because it held that even though the article concerned a matter of public interest Mr. Gertz was not a public figure. Therefore, he did not have to prove actual malice to recover compensatory damages so long as liability was not imposed on the petitioner without fault and Mr. Gertz proved his compensatory damages rather than allowing them to be presumed as had happened at the first trial. *Gertz I, supra*, 418 U.S. at 352. Because Mr. Gertz had not been permitted to make a claim for compensatory damages by a stan-

[2]For the convenience of the Court, the 1982 and 1972 decisions of the Court of Appeals and the opinions of the second District Court are set forth in the Appendix at App. 3a, 37a, 29a and 31a respectively.

dard less than that imposed by *New York Times, supra,* he was granted a new trial to pursue that remedy.

On remand the District Court in ruling on cross motions for summary judgment found that it was the law of the case that Mr. Gertz was not a public figure and that the article contained false statements. It refused the petitioner's request to find as the law of the case that the petitioner had not published with actual malice. Memorandum Opinions, June 7, 1977, and Feb. 15, 1978 (App. 29a, 31a).

At the conclusion of the evidence, the District Court held that because public records had been relied upon in the preparation of the article the petitioner was entitled to a conditional common law privilege under Illinois law, which then required Mr. Gertz to prove actual malice to recover compensatory as well as punitive damages. The jury was instructed accordingly. 680 F.2d at 534 (App. 14a).

On April 22, 1981, the jury returned a verdict awarding the respondent $100,000 in compensatory damages and $300,000 in punitive damages. The District Court denied petitioner's motions for judgment notwithstanding the verdict, a new trial and a remittitur.

On appeal, the Seventh Circuit affirmed, holding that the actual malice issue was not "determined and foreclosed from reconsideration" by this Court in *Gertz I;* that a finding of actual malice was supported by the evidence; and that a sufficient actual injury was proved to support compensatory damages. A timely petition for rehearing and suggestion for rehearing *in banc* was denied.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals conflicts with this Court's interpretation of the actual malice standard in defamation cases as explicated in *Gertz I, supra,* 418 U.S. at 335 n. 6, *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968), and *Garrison*

v. Louisiana, 379 U.S. 64, 77 (1964), and presents other important federal questions which should be decided by this Court.

When this Court first heard this case over eight years ago, it issued a landmark opinion, *Gertz I, supra,* 418 U.S. 323, one that has had a profound impact on the law of libel. Petitioner submits that the court below misunderstood and misapplied several important holdings in that opinion and thus its decision is in direct conflict with this Court's decision rendered in 1974. If unreviewed, the Court of Appeals' decision portends major changes in libel law as established by this Court.

The importance of this case is as follows. First, the Court of Appeals decision allows juries to use an objective standard in establishing whether a defamation defendant acted in reckless disregard of the truth, rather than the subjective standard required by this Court since *New York Times, supra.* This leads, as in this case, to a jury and the reviewing court utilizing their own political viewpoints to determine whether a defendant should have been made aware of probable falsity.

Second, the Court of Appeals decision demands that editors independently investigate material submitted by freelance writers even when the editors do not doubt the writer's veracity. This places an intolerable burden on editors, particularly of magazines and books, who publish material written by freelancers.

Third, the decision below holds that non-specific political characterizations can be considered false statements of fact, and therefore actionable, rather than constitutionally protected expressions of opinion.

Fourth, the Court of Appeals allowed recovery of compensatory and concomitant punitive damages in the absence of proof of injury to reputation. This ignores the essential element of a libel action, damage to reputation. This is an important federal Constitutional question that needs to be considered by this Court.

Fifth, contrary to the law of the case in *Gertz I*, the District Court and the Court of Appeals erred on remand in allowing the issue of actual malice to be litigated when this Court had determined that there was no actual malice and had granted a new trial solely for the purpose of litigating issues of negligence and compensatory damages, which became unnecessary when the trial court held that Illinois law required an actual malice finding in the circumstances of this case.

I. IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS, THE COURT BELOW UTILIZED AN OBJECTIVE RATHER THAN A SUBJECTIVE STANDARD IN DETERMINING THE EXISTENCE OF ACTUAL MALICE.

The trial court ruled, and the jury was instructed, that in order for respondent to recover he had to prove that the defamatory statements were made with actual malice, *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 534 (7th Cir. 1982) (App. 13a), defined by this Court as being "with knowledge that [they were] false or with reckless disregard of whether [they were] false or not."[3] *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

"Reckless disregard" as to falsity requires evidence showing a "high degree of awareness of . . . probable falsity," *Garrison v. Louisiana, supra*, 379 U.S. at 74, or evidence permitting "the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson, supra*, 390 U.S. at 731. *See Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 84-85 (1967).

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[3]Whether the trial court should have required the jury to find actual malice because of conditional privilege under Illinois law before awarding either compensatory or punitive damages was finally resolved by the Seventh Circuit thusly: "The jury below, however, was required to find that negligence *and* actual malice were proved to find liability." Gertz v. Robert Welch, Inc., 680 F.2d 527, 537 (7th Cir. 1982) (emphasis added by Court of Appeals) (App. 21a). Under *Gertz I, supra*, actual malice must be found before punitive damages can be awarded.

In *Gertz I* and *St. Amant,* this Court held that actual malice is a subjective standard, not one measured by an objective, "reasonable person" test. That is, reckless disregard for the truth is "equated . . . with subjective awareness of probable falsity . . .," *Gertz I, supra,* 418 U.S. at 335 n. 6, *and not* "whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant v. Thompson, supra,* 390 U.S. at 731. "There must be sufficient evidence to permit the conclusion that the *defendant in fact* entertained serious doubts as to the truth of his publication." *Id.* at 731 (emphasis added). This Court has emphasized that a defamation plaintiff must "focus on the conduct and state of mind of the defendant." *Herbert v. Lando,* 441 U.S. 153, 160 (1979).

However, the Court of Appeals incorrectly used an objective, "reasonable man" test in this case, mistakenly applying language in *St. Amant:* "'Professions of good faith will be unlikely to prove persuasive, . . . when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found *where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.' St. Amant v. Thompson,* 390 U.S. 727, 732 (footnote omitted) . . . ." 680 F.2d at 538 (emphasis added by Court of Appeals) (App. 22a).

The Court of Appeals found that the editor Mr. Stanley had "obvious reasons" to doubt the author Mr. Stang's "veracity" or "accuracy" because: (1) Mr. Stanley knew Mr. Stang, solicited the article from him and was familiar with his prior work; (2) in that prior work Mr. Stang allegedly "[i]nvariably . . . had labeled someone a Communist" and thus had a "known and *unreasonable* propensity to label persons or organizations as Communist" (App. 23a, 24a) (emphasis added); and (3) in light of these supposedly objective warnings of Mr. Stang's alleged unreliability, Mr. Stanley conducted only a brief independent investigation of the facts. The Court of Appeals then concluded that these facts were "more than enough evidence" to

show that the "article was published with utter disregard for the truth or falsity of the statements" about Mr. Gertz. 680 F.2d at 538, 539 (App. 24a).

The facts relied upon by the Court of Appeals are constitutionally insufficient to support a finding of actual malice. The Court of Appeals finding of actual malice derives from its application of an objective, "reasonable man" test rather than the constitutionally required test of subjective awareness of probable falsity on the part of the editor.

The Court of Appeals in the instant case focused on the writer's previously expressed political opinions, noting that he had written articles and books for the publisher, some of which Mr. Stanley had edited, and contending that Mr. Stang had "a known and unreasonable propensity" to label as Marxist or under Communist control such "diverse persons and organizations . . . [as] Richard Nixon, John Foster Dulles, U Thant, Hubert Humphrey, Pierre Trudeau, Dr. Martin Luther King, and the Democratic Party." 680 F.2d at 538, 539 (App. 23a). According to the court, these opinions constituted "'obvious reasons to doubt the veracity . . . or accuracy' of the author . . ." *Id.* at 538.[4]

However much one with mainstream political opinions may find that Mr. Stanley should have had "obvious reasons" to question the writer, those reasons were not obvious to an editor who shared such views. Mr. Stanley was editor of a magazine published by a politically conservative organization. His own

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[4]Although this petition is not the place for a detailed discussion of the evidence, two things about the Court of Appeals' use of this "evidence" as supplying reason for Mr. Stanley to doubt Mr. Stang's veracity should be noted: (1) the "evidence" concerning Richard Nixon was stricken by the trial court (Tr. 217); and (2) after a lengthy argument the trial court refused to allow Mr. Stang to explain the factual basis for his political views, holding that to be irrelevant to the article (Tr. 465-69) —yet those same views form the lynchpin of the Seventh Circuit's finding on actual malice.

political beliefs were close to the writer's; there is no evidence in the record that he thought the article's accusations were obviously incorrect. The article's thesis, that there existed a Communist conspiracy to discredit the nation's police, was not without support among conservative groups in the late 1960s and would not appear highly unusual to many on the political right. In fact, the article was perfectly plausible to Mr. Stanley. This reasoning is entirely consistent with the earlier decision in this case rendered by the Court of Appeals which, speaking through then-Circuit Judge Stevens, said that "[e]ven if the [John Birch Society's] references to President Eisenhower [as a Communist] had been offered [in evidence], such evidence would not meet the *New York Times* standard . . . . At most, . . . [such an accusation] *tends to prove that Stanley would be less disposed than another editor to question the author's characterization of plaintiff.*" *Gertz v. Robert Welch, Inc.*, 471 F.2d 801, 807-08 n. 15 (7th Cir. 1972) (emphasis added) (App. 49a). To an editor who agreed with the writer's political views the article in question was not obviously inaccurate so as to place him on notice that the author was unreliable.

In holding that an author's "unreasonable" political beliefs and opinions can be an obvious reason to doubt his veracity or accuracy, the Court of Appeals decision conflicts with every other court which has faced the question, all of which have reached a conclusion contrary to that of the lower court here. *See, e.g., Vandenburg v. Newsweek, Inc.*, 507 F.2d 1024, 1028-29 n. 7 (5th Cir. 1975) (political and social bias of a source is not an indication of potential falsehood); *Walker v. Pulitzer Publishing Co.*, 394 F.2d 800, 806 (8th Cir. 1968) (defendant's clear political bias in its editorial policy so as to emphasize unfavorable comment on persons holding contrary views cannot be evidence of actual malice); *Washington Post Co. v. Keogh*, 365 F.2d 965, 971-72 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967) (columnist's controversial reputation even for veracity is irrelevant to finding of actual malice); *Nader v. de Toledano*, 408 A.2d 31, 56 (D.C. 1979), *cert. denied*, 444 U.S.

1078 (1980) (controversial and iconoclastic nature of author's viewpoints does not as a matter of law put publisher on notice of probable falsity); *Kidder v. Anderson,* 354 So. 2d 1306, 1309 (La.), *cert. denied,* 439 U.S. 829 (1978) (mere fact that source might be politically motivated cannot form the basis for holding that publisher acted with reckless disregard for the truth).[5]

The Court of Appeals emphasized that "Stanley solicited the article," and that "Stanley had contacted Stang and told him that a Chicago policeman was being railroaded for murder, part of the nationwide Communist conspiracy to discredit police." *Gertz v. Robert Welch, Inc.,* 680 F.2d 527, 538 (7th Cir. 1982) (App. 23a). This only confirms further that Mr. Stanley would agree with the views expressed by Mr. Stang in the article. Mr. Stang's views, then, would not be obvious reasons for *Mr. Stanley* to doubt the article's truthfulness.[6] Additionally, because Mr. Stanley had extensive prior experience with Mr. Stang's heavily documented writings, Mr. Stanley believed that Mr. Stang's work was "scrupulously accurate as to detail and fact in every instance" which he had encountered. (Tr. 397-98.)

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[5]None of the four cases relied upon by the Court of Appeals (App. 22a) utilized the opinions and belief of the source as showing that a publisher should be aware that that source may be inaccurate. All of the cases dealt with facts. *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 169-70 (1967) (Warren, C.J., concurring) (author placed on notice by at least two persons that specific parts of story were false); *Carson v. Allied News Co.,* 529 F.2d 206, 212 (7th Cir. 1976) (author admitted fabricating parts of story); *Grzelak v. Calumet Publishing Co.,* 543 F.2d 579, 583 (7th Cir. 1975) (when publisher does not doubt either the integrity of the source or the accuracy of the facts, actual malice cannot be found); and *Fadell v. Minneapolis Star & Tribune Co.,* 425 F. Supp. 1075, 1084 n. 7 (N.D. Ind. 1976), *aff'd,* 537 F.2d 107 (7th Cir.), *cert. denied,* 434 U.S. 966 (1977) (charges are not inherently improbable merely because they are serious).

[6]In fact, the record shows that Mr. Stanley learned of the Chicago situation from a member of the John Birch Society. Mr. Stanley then contracted with Mr. Stang to investigate, but did not ask him to "slant" the resulting article in any way. (Tr. 187-88.)

Likewise, Mr. Stanley's office never had received a complaint about Mr. Stang's work nor needed to publish a retraction based on anything written by him. (Tr. 401.) Accordingly, Mr. Stanley, for all these reasons, *subjectively* had no reason whatsoever to doubt the accuracy of Mr. Stang's article, and certainly could not have acted with "reckless disregard" of any falsity, as required by *New York Times* and its progeny.

The Court of Appeals holding forces all publishers and editors to reframe their thinking into a generally acceptable political mold so that when a writer's opinions differ significantly from the mainstream they will appear obviously inaccurate – no matter what the publisher's or editor's actual political beliefs are. That is, a publisher or editor holding, for example, a strongly liberal or conservative viewpoint will not be able to use his subjective frame of reference in assessing submissions for fear that material appearing reasonable to him will, in fact, be seen as obviously inaccurate by courts and juries whose political opinions are not as strongly liberal or conservative.

Mr. Gertz did not establish with "convincing clarity," *New York Times Co. v. Sullivan, supra,* 376 U.S. at 285-86, that the editor actually knew anything at the time of publication that would cause him to believe the story was false. *See St. Amant v. Thompson, supra,* 390 U.S. at 732-33. In finding there was sufficient evidence of actual malice to submit this case to a jury, the Court of Appeals made its objective measurement based only on its political stance, not on Mr. Stanley's subjective viewpoint. An objective standard – no matter whose – is not permitted by this Court's prior holdings.

If the Court of Appeals decision stands, juries and trial courts will be able to find actual malice in the publication of material that does not agree with their political proclivities rather than in material published when the publisher or editor *in fact* knew of falsity or acted in "reckless disregard" of whether a statement was false or not. The decision places an unconstitutional burden on the expression of controversial political opinion.

II. THE DECISION BELOW RAISES A SIGNIFICANT CONSTITUTIONAL PROBLEM IN ATTRIBUTING TO THE PUBLISHER AS PROOF OF ACTUAL MALICE A FREELANCE AUTHOR'S CONDUCT WHILE WRITING AN ALLEGEDLY DEFAMATORY ARTICLE

While the determination of whether an agency relationship exists ordinarily is a matter of state law, here the Court of Appeals used that supposed relationship to determine the petitioner's subjective awareness of falsity of the allegedly defamatory article; it thus becomes an important federal question whether attribution to a publisher of a freelance writer's actions is permitted under the First Amendment.

The Court of Appeals, in a lengthy footnote, found Mr. Stang's "conduct in investigating and researching the article . . . attributable to Welch because of the agency relationship between them." 680 F.2d at 539 n. 19 (App. 25a). Since the court held that Mr. Stang's conduct "is evidence of actual malice," *id.*, under an agency theory the petitioner was found to have acted with actual malice.

Significantly, the first Court of Appeals decision found that no agency relationship existed between Mr. Stang and the petitioner: "Plaintiff seems to contend . . . that defendant should be held liable on a *respondeat superior* doctrine for the malice of Stang. We do not find the . . . 'contributing editor' characterization [as listed in later issues of the magazine] . . . sufficient to change the free-lance character of Stang's relationship with defendant." *Gertz v. Robert Welch, Inc.*, 471 F.2d 801, 808 n.15 (7th Cir. 1972) (App. 49a). The evidence on that relationship was no different at the second trial than the first.[7]

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[7]Furthermore, the jury instruction on the proof needed to establish reckless disregard for the truth concerned the knowledge of the publisher, not the writer. Likewise, the jury was instructed on liability for republication of a libel, which was unnecessary if Mr. Stang was the petitioner's agent.

The concept of freelance writers and photographers is familiar to this Court and other courts. *See, e.g., Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 563 (1977); *Time, Inc. v. Hill*, 385 U.S. 374, 392 (1967); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 435 (10th Cir. 1977); *Virgil v. Time, Inc.*, 527 F.2d 1122, 1124 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976). Freelancers accept assignments from, or submit material to, a variety of publications. They may be associated more with one publication than others, having had their work appear more frequently therein, but they remain free to contract with those whom they wish.

Several courts have held that a freelance writer's actions which may constitute actual malice are not attributable to the publisher under any agency theory. Only the publisher's own overt behavior or knowledge of an employee's behavior can support a finding of actual malice on his part. *Miss America Pageant, Inc. v. Penthouse International, Ltd.* 524 F. Supp. 1280, 1284, 1286-88 (D.N.J. 1981) (freelance writer's knowledge not attributable to magazine publisher); *Bindrim v. Mitchell*, 91 Cal. App. 3d 61, 74-75, 155 Cal. Rptr. 29, 36 (1979) (freelance author's knowledge not attributed to book publisher). *See Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 253-54 n. 6 (1974). The reason is explained in *Catalano v. Pechous*, 83 Ill. 2d 146, 50 Ill. Dec. 242, 419 N.E.2d 350, 361 (1980), *cert. denied*, 451 U.S. 911 (1981), which states that a "republisher of a defamatory statement . . . cannot be held liable [when actual malice is required] unless he himself knew at the time when the statement was published that it was false, or acted in reckless disregard of its truth or falsity. It is not sufficent that the originator of the statement made it with actual malice."[8]

[8]Although a republisher of a libel can be held liable for compensatory damages on a negligence theory, the Court of Appeals imputed alleged actual malice on the part of Mr. Stang to the petitioner. Furthermore, petitioner does not concede that Mr. Stang acted with actual malice, and the recitation by the Court of Appeals, 680 F.2d at 539 n. 19 (App. 25a), reflects at best *negligence* on Mr. Stang's part, rather than knowing falsity or reckless disregard of the truth.

It would destroy the "clear and convincing proof" requirement, *Gertz I, supra,* 418 U.S. at 342, to attribute actions of freelance writers to publishers through an agency theory in order to find that publishers acted with actual malice. Were this permitted, a publisher who has confidence in a freelance writer, who has no reason to doubt the truthfulness of an article and who may even have investigated further himself could be found to have acted with actual malice even though the freelance writer was not an agent or employee of the publisher.[9]

Moreover, the relationship between magazines and freelance writers also comports with the general definition of independent contractor. That is, an independent contractor is one who contracts to do certain work according to his own methods subject to the control of his employer only as regards the product or result of his work. *Casement v. Brown,* 148 U.S. 615, 622 (1893). Similarly, a freelance writer is one who writes "either on speculation or on orders from the editors. These writers are paid fees for their work and do not function as members of the staff." W. Agee, P. Ault & E. Emery, *Introduction to Mass Communications* 246 (6th ed. 1979).

Mr. Stang, then, was a freelance writer, not an agent of the petitioner. In that capacity, his actions could not be attributed to the publisher in order to hold that the publisher acted with actual malice. Because the Court of Appeals did so, it has both ignored the prior teachings of this Court and has presented an important, recurring question of constitutional libel law which this Court should review.

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[9]The cases relied on by the Court of Appeals to support its contention that an agency relationship existed between Mr. Stang and Robert Welch, Inc., are inapposite since none of them hold or infer that a freelance writer is an agent of the publisher. They do no more than repeat general agency law. *Gertz v. Robert Welch, Inc., supra,* 680 F.2d at 539 n. 19 (App. 25a).

III. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT IN HOLDING THAT A STATEMENT THAT A PERSON IS A "MARXIST," "LENINIST" OR "COMMUNIST-FRONTER," BASED ON PRESENTED FACTS, IS A STATEMENT OF FACT AND THUS NOT PROTECTED AS OPINION UNDER THE FIRST AMENDMENT

The Court of Appeals ruling conflicts with this Court's holding in this very case and with other courts which have followed that decision. This Court held as follows:

> We begin with the common ground. *Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.* But there is no constitutional value in false statements of fact.

418 U.S. at 339-40 (footnote omitted) (emphasis added).

That is, as one court has said, "An assertion that cannot be proved false cannot be held libelous." *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977). Since opinions are not statements of fact and, therefore, cannot be proved false, they cannot be defamatory. *See Buckley v. Littell*, 539 F.2d 882, 893 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977), holding that "what constitutes an 'openly fascist' journal is as much a matter of opinion or idea as is the question what constitutes 'fascism' or the 'radical right' . . . ." *Id.* at 895. Many state and federal courts have followed this approach. *See, e.g., Orr v. Argus-Press Co.*, 586 F.2d 1108, 1114 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979) (statement of opinion is not defamatory); *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 601, 131 Cal. Rptr. 641, 552 P.2d 425 (1976) (statements of opinion cannot constitute actionable defamation); *Bucher v. Roberts*, 198 Colo. 1, 595 P.2d 239 (1979) (adopting *Gertz I* approach and *Restatement (Second) of Torts* § 566); *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 448 A.2d 1317, 1325 (1982) ("expressions

of 'pure' opinions . . . are guaranteed virtually complete constitutional protection"); *Mashburn v. Collin*, 355 So. 2d 879 (La. 1977) (expressions of opinion are protected by First Amendment); *Myers v. Boston Magazine, Inc.*, 1980 Mass. Adv. Sh. 907, 403 N.E.2d 376 (1980) (statements of critical opinion not actionable defamation); *Pease v. Telegraph Publishing Co., Inc.*, 121 N.H. 62, 426 A.2d 463 (1981) (opinion is protected under First Amendment); *Kotlikoff v. Community News*, 89 N.J. 62, 444 A.2d 1086 (1982) (adopting *Gertz I*, and *Restatement (Second) of Torts* § 566); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 397 N.Y.S.2d 943, 366 N.E.2d 1299, *cert. denied*, 434 U.S. 969 (1977) (statement of opinion not actionable defamation); *Ollman v. Evans*, 479 F. Supp. 292, 293 (D.D.C. 1979) (opinion not actionable, adopting *Gertz I*).

In reaching this conclusion, the Court of Appeals incorrectly stated that Gertz was described as "a Communist or part of a Communist conspiracy," *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 531 (7th Cir. 1982) (App. 6a). This Court previously and correctly observed that the petitioenr's article said no more than that Mr. Gertz "had been an official of the 'Marxist League for Industrial Democracy . . .' [and] labeled Gertz a 'Leninist' and a 'Communist-fronter.'" *Gertz I, supra*, 418 U.S. at 327. The article did *not* say that Mr. Gertz was a member of the Communist Party or that he was a Communist.

Labeling a person a "Marxist," "Leninist" or "Communist-fronter" is not a specific allegation of fact, such as membership in an organization, especially when the article listed the memberships upon which these characterizations are based. Those terms are no more a statement of fact than labeling someone a "left-winger," a "radical," a "reactionary," a "fascist" or a "racist." Each of these terms is susceptible to a wide variety of meanings, in large part determined by the speaker's own political ideology.

It is particularly important to hold political hyperbole as opinion, and thus protected, since, as this Court has emphasized, there is "a profound national commitment to the principle

that debate on public issues should be uninhibited, robust, and wide-open . . . ." *New York Times Co. v. Sullivan, supra,* 376 U.S. at 270. Thus this Court and other courts have protected exaggerated and even outrageous political speech on this basis. *See, e.g., Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler,* 398 U.S. 6 (1970) ("blackmail" used to characterize negotiating position of real estate developer). Because the Court of Appeals decision conflicts with these rulings, it should be reviewed by this Court.

IV. THE DECISION BELOW RAISES A SIGNIFICANT AND RECURRENT QUESTION OF FEDERAL CONSTITUTIONAL LAW REGARDING WHETHER A DEFAMATION ACTION SHOULD BE PERMITTED IN THE ABSENCE OF PROOF OF INJURY TO REPUTATION

An independent reason for this Court to grant its writ of certiorari is that the damage award in this defamation action was not based on any proven injury to reputation.

In attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment, *see Gertz I, supra,* 418 U.S. at 349, this Court held that without proof of actual malice defamation plaintiffs are limited to compensation for actual injury. *Id.* While not defining the term, this Court said that such damages are "not limited to out-of-pocket loss . . . [but] include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Id.* at 350. State courts were allowed to define the term further, *id.,* but were admonished to be certain that plaintiffs not secure "gratuitous awards of money damages far in excess of any actual injury." *Id.* at 349. *See Stone v. Essex County Newspapers, Inc.,* 367 Mass. 849, 861, 330 N.E.2d 161, 170 (1975) ("[J]udges have a special duty of vigilance in . . . see[ing] that damages are no more than compensatory.")

Mr. Gertz presented no proof that he suffered actual damages as a result of the alleged libel beyond an allegation that his feelings were hurt. Particularly, he did not prove injury to reputation. Rather, the testimony was that his reputation was impeccable both both before and after publication of the article, and there was no evidence of loss of income resulting from the article. Nevertheless, the jury awarded Mr. Gertz $100,000 in actual and $300,000 in punitive damages, the second largest defamation award against a media defendant upheld by an appellate court since *New York Times Co. v. Sullivan, supra,* 376 U.S. 254.[10]

It is critical in fostering robust debate and avoiding self-censorship that juries not be allowed to award what are in essence punitive damages in the guise of compensatory damages without proof of injury to reputation. *See Gertz I, supra,* 418 U.S. at 349 (deploring allowing "juries to punish unpopular opinion" through recovery of "gratuitous" damages of $50,000 without evidence of actual loss).[11]

Certainly, self censorship would result if the compensatory damage award in this case is allowed to stand. Damage awards,

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[10] *See* Franklin, *Suing the Media for Libel: A Litigation Study,* 1981 ABF Research J. 795; Libel Defense Resource Center Bulletin, Aug. 15, 1982, at 2-17.

The largest damage award upheld since 1964 was in *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967) ($460,000 combined damages).

[11] "It's not that I necessarily want to give $400,000 to Elmer Gertz," the 25-year-old foreman [of the jury at the second trial] said outside the courtroom after the verdict was returned. "I was looking at it like I really wanted to punish the John Birch Society, the only quetion was the amount of the damages. I personally would have liked it higher because I wanted to stick it to the John Birch Society." *See* "Gertz Verdict: Leninist Label Was Malicious Libel," attached as an exhibit to Defendant's Amended Post Trial Motion, filed May 21, 1981. *See* Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer,* 61 Va. L. Rev. 1349, 1438-39 (1975).

at least when the mass media are defendants, based not on injury to reputation or concomitant loss of income but on asserted personal humiliation contravene such precepts.[12]

This particularly is true when it is realized that, as this Court has said, "damage to reputation is, of course, the essence of libel." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971). *See* W. Prosser, *Law of Torts* 737 (4th ed. 1971) (defamation law protects "an invasion of the interest in reputation and good name"). Defamation law is intended to protect the good opinion others in the community have of one allegedly defamed. Indeed, derogatory words said to an individual but not to others may cause personal anguish, but are not defamatory because they did not cause a diminution in the individual's reputation. As Professor Prosser emphasizes, "Defamation is not concerned with the plaintiff's own humiliation, wrath or sorrow, except as an element of 'parasitic' damages attached to an independent cause of action." *Id. See id.* at 739, 761; *Gobin v. Globe Publishing Co.*, 8 Med. L. Rptr. 2191, 2194 (Kan. 1982).

Several state courts have agreed. The Kansas Supreme Court held that "[u]nless injury to reputation is shown, plaintiff has not established a valid claim for defamation . . . . It is reputation which is defamed, reputation which is injured, reputation which is protected by the laws of libel and slander." *Gobin v. Globe Publishing, supra*, 8 Med. L. Rptr. at 2194. *See France v. St. Clare's Hospital & Health Center*, 82 App. Div. 2d 1, 441 N.Y.S.2d 79 (1981); *Salamone v. MacMillan Publishing Co., Inc.*, 77 App. Div. 2d 501, 429 N.Y.S.2d 441 (1980). This position has been stated forcefully by Justice Brennan. *Time, Inc. v. Firestone*, 424 U.S. 448, 475 n. 3 (1976) (Brennan, J., dissenting).

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[12]Although this Court in *Gertz I, supra*, 418 U.S. at 350, included "personal humiliation" and "mental anguish" as elements of compensatory damages, petitioner submits that this Court did not intend to allow such elements without adequate proof of damage to reputation.

To the extent that *Time, Inc. v. Firestone, supra,* holds otherwise in rejecting an argument that "the only compensable injury in a defamation action is that which may be done to one's reputation" in allowing Florida "to permit recovery for other injuries without regard to measuring the effect the falsehood may have had upon a plaintiff's reputation," *id.* at 460, it either should be properly limited or reevaluated in light of the historical purpose of defamation laws and the necessary protection this Court has given the media in discussing public issues.

The Court of Appeals decision squarely presents the issue of whether damages for libel can be awarded consistent with First Amendment principles absent proof of damage to reputation. That is an important question for this Court to resolve.

V. THE DECISION BELOW CONFLICTS WITH THIS COURT'S EARLIER OPINION BECAUSE UNDER THE DOCTRINE OF LAW OF THE CASE, ACTUAL MALICE SHOULD NOT HAVE BEEN RELITIGATED AFTER BEING FULLY LITIGATED PREVIOUSLY AND FOUND NOT TO EXIST

This Court has stated that "when an issue is once litigated and decided that should be the end of the matter." *United States v. United States Smelting Refining & Mining Co.,* 339 U.S. 186, 198 (1950). While the Court of Appeals agreed, it incorrectly held that the trial court could relitigate the issue of actual malice on the basis that the issue had not been decided by this Court. *Gertz v. Robert Welch, Inc.,* 680 F.2d 527, 532-33 (7th Cir. 1982) (App. 10a-11a).

Indeed, not only did this Court necessarily decide the issue, but two other courts did so as well, all agreeing that actual malice was not proved against the petitioner in the first trial.

At the trial on remand in this case, the district court held, based on Illinois law decided after *Gertz I,* that Mr. Gertz would be required to prove actual malice to recover even compensatory damages. *See Gertz v. Robert Welch, Inc.,* 680 F.2d 527,

532 (7th Cir. 1982) (App. 8a).[13] At that time, the District Court, once finding that Mr. Gertz was required to prove actual malice, was required to follow the law of the case and not allow the case to be submitted to the jury, since this Court, the first District Court, and the Court of Appeals all had held that Robert Welch, Inc., did not publish with actual malice. Specifically:

(1) The first District Court withdrew all issues from the jury except the proper measure of damages. *Gertz v. Robert Welch, Inc.*, 322 F. Supp. 997, 998 (N.D. Ill. 1970).

With respect to the lack of actual malice the District Court held in the first trial:

> Stanley clearly did not act with actual malice or with reckless disregard for the truth . . . .
>
> Plaintiff having failed to establish actual malice on the part of defendant . . . .
>
> * * *
>
> Having already concluded that there was not sufficient evidence presented at trial to support a finding of actual malice or reckless disregard for the truth, judgment notwithstanding the verdict should be entered for the defendant.

322 F. Supp. at 999, 1000 (citation omitted).

In addition to concluding that the respondent had not presented sufficient evidence at trial to support a finding of actual malice, the District Court held that "no jury could

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[13]The trial court required proof of actual malice for compensatory damages because of its reliance on conditional privilege under Illinois law. *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 534 (7th Cir. 1982) (App. 14a). Of course, once the trial court decided punitive damages could be awarded despite this Court's earlier decision, proof of actual malice was necessary.

reasonably find that the defendant acted with actual malice." 322 F. Supp. at 1000.[14]

(2) The first Court of Appeals decision held that there was no evidence that the petitioner had published Mr. Stang's article with actual malice:

> There is no evidence that Stanley actually knew that Stang's article was false; defendant did not "deliberately publish falsehoods." The question is whether the publication was made recklessly.
>
> * * *
>
> Second, the Court has plainly stated that the evidence establishing reckless disregard for the truth must be clear and convincing, and that an appellate court has an independent obligation to make its own analysis of the record before a finding that a comment was reckless may be approved. Unquestionably, in a close case the policy of encouraging free and uninhibited expression is to be preferred over the conflicting policy of deterring irresponsible defamatory comment. Apart from the failure to verify Stang's facts, and an apparent disposition to assume that a lawyer who could file a civil rights case against a policeman may well be a "Communist fronter," *there is no evidence that Stanley acted recklessly within the Supreme Court's definition of that term.*
>
> To assume that Stanley must have known, on the basis of information received from Stang over the telephone or from some other source, that the comments about plaintiff were false, would itself be reckless. Our examination of the record satisfies us that "'the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands.'"

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[14]At the first trial the District Court also stated several times during the argument on motion for directed verdict that actual malice had not been shown. Tr. 55-56, 58-59, Sept. 22, 1970.

471 F.2d at 806-07 (footnote omitted) (emphasis added) (App. 46a-48a).

(3) Implicit in this Court's decision in *Gertz I* is that Mr. Gertz failed to prove that the defendant acted with actual malice. This finding is clear from both the majority and a dissenting opinion:

> After reviewing the record, the Court of Appeals endorsed the District Court's conclusion that petitioner had failed to show by clear and convincing evidence that respondent had acted with "actual malice" as defined by *New York Times*. There was no evidence that the managing editor of American Opinion knew of the falsity of the accusations made in the article. In fact, he knew nothing about petitioner except what he learned from the article. The court correctly noted that mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth. Rather, the publisher must act with a "'high degree of awareness of . . . probable falsity.'" . . . *The evidence in this case did not reveal that respondent had cause for such an awareness.*

Gertz I, 418 U.S. at 330-32 (citations omitted) (emphasis added).

> It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury.

Gertz I, 418 U.S. at 349.

> Petitioner [Gertz] asserts that the entry of judgment *n.o.v.* on the basis of his failure to show knowledge of falsity or reckless disregard for the truth constituted unfair surprise and deprived him of a full and fair opportunity to prove "actual malice" on the part of respondent. This contention is not supported by the record.
>
> * * *

> Thus, petitioner had every opportunity, indeed incentive, to prove "reckless disregard" if he could, and he in fact attempted to do so.

Gertz I, 418 U.S. at 329-30 n. 2.

Justice Brennan in his dissenting opinion also recognized that the majority had found that Gertz had had the opportunity to prove actual malice but had failed to do so:

> Since petitioner failed, after having been given a full and fair opportunity, to prove that respondent published the disputed article with knowledge of its falsity or with reckless disregard of the truth, see *ante*, at 329-30, n. 2, I would affirm the judgment of the Court of Appeals.

Gertz I, 418 U.S. at 369.

The issue of "actual malice" was fully litigated in the first trial and the trial court, the Court of Appeals and this Court each held that Mr. Gertz had failed to prove actual malice. Moreover, he lost in both the Court of Appeals and this Court on his alternate theory that he had been deprived of the opportunity to prove actual malice.

The Court of Appeals erred when it stated that "[w]hether or not actual malice had been proved below simply was not an issue before the [Supreme] Court." *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 533 (7th Cir. 1982) (App. 12a). It was equally in error when it stated that this Court only "suggests" in several places that actual malice was not proven at the first trial. *Id.* at 532 n. 5 (App. 10a). This Court not only found that actual malice had not been proven at the first trial, but that finding was critical to its disposition of the case.

The key to demonstrating the Court of Appeals' disregard of this Court's mandate is analyzing why this Court remanded the case for retrial rather than reinstating the initial jury's $50,000 verdict. The first District Court entered judgment n.o.v. for the petitioner and the Court of Appeals affirmed, holding that Mr.

Gertz was required to prove actual malice to recover even compensatory damages. Thus when this Court reversed in *Gertz I, supra,* 418 U.S. 323 on the ground that Mr. Gertz was *not* a public figure and therefore did not have to prove actual malice, it remanded the case for a new trial only because the $50,000 verdict was not supported by any evidence of negligence or actual injury. Thus, in addition to the public figure issue, this Court's ruling was peculiarly concerned with the proper standard for an award of compensatory damages. This Court held that because Mr. Gertz had been required to show a higher standard (actual malice) than negligence he should be allowed a retrial at which point he could attempt to obtain compensatory damages under a lesser standard, provided that there was sufficient evidence of actual injury. The remand required only that the plaintiff be given the opportunity to prove negligence and actual injury, and the issue of actual malice was no longer in the case for purposes of the trial. Moreover, as noted above, this court found that Mr. Gertz had tried and failed to prove actual malice at the first trial.

The only reasonable conclusion is that the remand was for the trial of the issue of compensatory damages, the issue of actual malice having been settled. Because the Court of Appeals disregarded this Court's mandate, its decision should be reviewed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 14, 1982

APPENDIX A

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 15, 1982

Before

Hon. RICHARD A. POSNER, Circuit Judge
Hon. DUDLEY B. BONSAL, Senior District Judge*

No. 81-2483

ELMER GERTZ,
Plaintiff-Appellee,

vs.

ROBERT WELCH, INC.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

No. 69 C 1288
Joel M. Flaum, *Judge*

ORDER

On June 30, 1982, Robert Welch, Inc., filed a petition for rehearing with suggestion for rehearing *en banc*. All of the judges of the original panel have voted to deny the

*Of the Southern District of New York.

petition,** and none of the active members of the court has requested a vote on the petition. The petition is therefore DENIED.

**Honorable Robert A. Sprecher, Circuit Judge, did not participate in the voting on this petition as he died on May 15, 1982.

APPENDIX B

Elmer GERTZ, Plaintiff-Appellee,

v.

ROBERT WELCH, INC.,
Defendant-Appellant.

No. 81-2483.

United States Court of Appeals,
Seventh Circuit.

Argued Feb. 8, 1982.
Decided June 16, 1982.

David Machanic, Pierson, Ball [&] Dowd, Washington, D.C., for defendant-appellant.

Wayne Giampietro, DeJong, Poltrock & Giampietro, Chicago, Ill., for plaintiff-appellee.

Before SPRECHER and POSNER, Circuit Judges, and BONSAL, Senior District Judge.*

SPRECHER, Circuit Judge.

This defamation action comes before us after retrial in the district court pursuant to the mandate of the Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94

*Judge Sprecher's untimely death occurred between the preparation of his opinion for the court and the voting on that opinion by the other judges on the appeal.

S.Ct. 2997, 41 L.Ed.2d 789 (1974). A jury found in favor of the plaintiff, Elmer Gertz, and awarded compensatory and punitive damages. We affirm.

I

In June, 1968, seventeen-year-old Ronald Nelson was shot and killed by Chicago police officer Richard Nuccio. Nuccio was subsequently indicted and convicted of murder. In addition to the criminal prosecution, the Nelson family retained Chicago attorney Ralla Klepak to file civil actions against Nuccio on behalf of the family. Klepak asked Elmer Gertz, a well-known, reputable Chicago attorney, to serve as co-counsel in the civil actions. Neither Gertz nor Klepak played any role in the criminal prosecution against Nuccio beyond attending the coroner's inquest to ask a few questions on behalf of the family. Gertz made no public statements or comments concerning the civil or criminal cases against Nuccio.

In April, 1969, shortly after Nuccio's initial conviction,[1] an article appeared in *American Opinion* entitled "Frame-Up—Richard Nuccio and the War on Police." *American Opinion* is a monthly magazine published by defendant Robert Welch, Inc. ("Welch"), a Massachusetts corporation which is an affiliate of the John Birch Society. The article alleged that Nuccio was being "railroaded" as part of a Communist conspiracy to undermine local police so as to pave the way for a national police force which would support and enforce a Communist dictatorship.

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[1] Nuccio's initial conviction was reversed by the Illinois Supreme Court. *People v. Nuccio*, 43 Ill.2d 375, 253 N.E.2d 353 (1969). On retrial, Nuccio was again convicted in a jury trial, and that conviction was affirmed. *People v. Nuccio*, 54 Ill.2d 39, 294 N.E.2d 276 (1973).

The article named Gertz as one of the members of this conspiracy. He was identified as the lawyer for the Nelson family and one of the leaders of the "attack on Nuccio." Gertz was described as a "Communist-fronter," a "Leninist," and a "Marxist."

> The file on Elmer Gertz in Chicago Police Intelligence takes a big, Irish cop to lift. According to the Communist *Worker* of December 8, 1964, he has signed a petition to abolish the House Committee on Un-American Activities. On May 12, 1966, he sponsored another such petition, published by the Illinois Division of the American Civil Liberties Union – founded by Harry F. Ward, one of the top Communists in the United States. Gertz also was a pallbearer for Jack Ruby, the "lone fanatic" who killed the "lone fanatic" who killed the President of the United States. He has been an official of the Marxist-League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government.
>
> * * * * * *
>
> In fact, the only thing Chicagoans need to know about Gertz is that he is one of the original officers, and has been Vice President, of the Communist National Lawyers Guild – which has been described by the House Committee on Un-American Activities as "one of the foremost legal bulwarks of the Communist Party" – and which probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democrat Convention.

Gertz was also identified as counsel to the commission which authored *Dissent and Disorder*, a report on the

April, 1968, demonstrations in Chicago which was critical of police conduct. The article described that report as "financed by the Roger Baldwin Foundation of Communist Harry Ward's A.C.L.U."

Gertz's role in the Nuccio case, according to the article, was as a leader of "an organized attempt to discredit our local police – organized primarily by the Communist National Lawyers Guild, preeminent in which is the same Elmer Gertz who now appears as the Nelsons' lawyer." Under a photo of Gertz was the caption "Elmer Gertz of Red Guild harasses Nuccio." The article also noted that "[t]wo Chicago Assistant Corporation Counsels warned Nuccio not to testify at the coroner's inquest, for fear what he said might jeopardize their defense against Communist-fronter Gertz."

The assertion that Gertz was a Communist or part of a Communist conspiracy was false. Many of the other statements concerning his membership in particular organizations also were false. When Gertz learned of the article, he filed this diversity suit for defamation in the Northern District of Illinois. In a pre-trial ruling, the trial court held that libelous words published by the defendant constituted libel *per se. Gertz v. Robert Welch, Inc.*, 306 F.Supp.310 (N.D.Ill.1969). Because of this ruling, injury was presumed, and, upon proof of the falsity of the statements in the article, the court submitted only the issue of damages to the jury. The jury returned a verdict in favor of Gertz and awarded damages of $50,000. The trial court, however, granted judgment notwithstanding the verdict on the basis that the subject matter of the article was of "public interest" and therefore required a showing of actual malice under the standard announced in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Gertz v. Robert Welch, Inc.*, 322

F.Supp. 997 (N.D.Ill.1970). Because the court found that actual malice had not been established, the jury's verdict could not stand. On appeal, this court affirmed. *Gertz v. Robert Welch, Inc.*, 471 F.2d 801 (7th Cir. 1972).

The Supreme Court granted certiorari and reverse. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). The Court disavowed the "public interest" doctrine[2] as a basis for requiring that actual malice be shown in suits involving defamation of private individuals. The Court further held that states could set their own standards of liability for defamation of private individuals as long as they did not impose liability without fault. Damages could not be awarded without proof of injury, however, and punitive damages required a showing of actual malice. The case was remanded for a new trial consistent with these guidelines.

On remand, Gertz amended his complaint to allege both negligence and actual malice by Welch, and requested compensatory and punitive damages. On cross-motions for summary judgment, the trial court held that, based on the law of the case, Gertz was not a public figure, but otherwise denied the motions of both parties. Shortly before trial, Welch was permitted to file an affirmative defense of conditional privilege based on the assertion that the article merely repeated statements in government publications.

After a six-day trial, the jury found in favor of Gertz and awarded compensatory damages of $100,000 and

[2]Justice Brennan's plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), had suggested that where an article deals with a matter of public interest it is protected by the First Amendment to the extent that any defamation is not the result of actual malice.

punitive damages of $300,000. It is from this judgment that Welch appeals.

II

Welch's initial argument is that the issue of actual malice was erroneously submitted to the jury in the second trial because the law of the case doctrine precluded the relitigation of that issue.[3] Welch bases this argument on the first trial court's finding, subsequently upheld by this court and the Supreme Court, that actual malice in publication of the article had not been proved. The issue of actual malice thus was foreclosed from being a basis for either liability or punitive damages. Welch would then read the Supreme Court's mandate remanding the case for a new trial as limited to the issues of whether liability existed and whether compensatory damages could be awarded predicated on a negligence theory. Because the trial court on remand determined that Welch was entitled to a conditional privilege which could only be overcome by a showing of actual malice, Welch argues that the trial court should have directed a verdict in its favor once the privilege was established.[4]

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[3]The law of the case argument was not made in any of the defendant's pleadings or pretrial motions. Ordinarily that would mean that the issue was waived and we would not address it on appeal. Because the law of the case doctrine as it applies to this case is not merely advisory, but is binding upon the court on remand, we deem it necessary to examine this issue.

[4]Because the trial court on remand accepted Welch's argument that a conditional privilege applied here, *see* Part III, the case once again centered on actual malice. Thus, if Welch is correct about the law of the case issue, it would be dispositive of this case unless a distinction could be drawn between actual malice under *New York Times Co. v. Sullivan* and actual malice sufficient to overcome a common law privilege. *See* footnote 13, *infra*.

The law of the case doctrine "is a rule of practice, based on sound policy that, when an issue is once litigated and decided, that should be the end of the matter." *Barrett v. Baylor,* 457 F.2d 119, 123 (7th Cir. 1972) (citing *United States v. United States Smelting, Refining & Mining Co.,* 339 U.S. 186, 198, 70 S.Ct. 537, 544, 94 L.Ed. 750 (1950)). The doctrine is a self-imposed prudential limitation rather than a recognition of a limitation of the courts' power. 1B Moore's Federal Practice ¶ 0.404[10] at 573 (2d ed. 1980). It is not, therefore, an immutable rule, but rather a way to foreclose continued appeals for reconsideration of prior rulings of law. In this respect, the law of the case doctrine must be distinguished from *res judicata:* "[O]ne directs discretion; the other supersedes it and compels judgment." *Southern Railway Co. v. Clift,* 260 U.S. 316, 319, 43 S.Ct. 126, 127, 67 L.Ed. 283 (1922). *Accord, Connett v. City of Jerseyville,* 110 F.2d 1015, 1018 (7th Cir. 1940).

There are two distinct situations where the law of the case doctrine is applicable. First, a court ordinarily will not reconsider its own decision made at an earlier stage of the trial or on a prior appeal, absent clear and convincing reasons to reexamine the prior ruling. *See, e.g., Appleton Electric Co. v. Graves Truck Line, Inc.,* 635 F.2d 603, 607-08 (7th Cir. 1980), *cert. denied,* 451 U.S. 976, 101 S.Ct. 2058 68 L.Ed.2d 357 (1981). Second, an inferior court must apply the decision of a superior appellate tribunal on remand. *See, e.g, James Burrough Ltd. v. Sign of the Beefeater, Inc.,* 572 F.2d 574, 577 (7th Cir. 1978).

It is the second situation which is before us in this case. Welch contends that the trial court failed to properly apply the Supreme Court's mandate, which, according to

Welch, included the finding that, as a matter of law, the article was published without actual malice.[5]

The duty of the inferior courts to enforce the mandate of the Supreme Court is clear:

> "When a case has been once decided by [the Supreme Court] on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. . . ."

Vendo v. Lektro-Vend Corp., 434 U.S. 425, 427-28, 98 S.Ct. 702, 703-704, 54 L.Ed.2d 659 (1978) (quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255, 16 S.Ct. 291, 293, 40 L.Ed. 414 (1895)). *See also Ex parte Sibbald v. United States*, 37 U.S. (12 Pet.) 487, 491, 9 L.Ed. 1167 (1838). It is equally clear, however, that "[w]hile a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Sprague v. Ticonic National Bank*, 307 U.S. 161, 168, 59 S.Ct. 777, 780-781, 83 L.Ed. 1184 (1939). *See also Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 179 (2d Cir. 1967), *cert. denied*, 390 U.S. 956, 88 S.Ct. 1038, 20 L.Ed.2d 1151 (1968). Thus, it is critical to determine what issues were actually decided in order to define what is the "law" of the case. This requires a careful reading of the Court's opinion: observations, commentary, or mere dicta touching upon issues not formally before the Court do not constitute binding determinations. *See Quern v. Jordan*, 440

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[5]Welch points to several places in the opinion where the Court suggests that actual malice was not proved at the first trial to support its position that the Court decided this issue. *See* 418 U.S. 329-30 n.2, 330-32, 94 S.Ct. 3001-3002 n.2, 3003.

U.S. 332, 347 n.18, 99 S.Ct. 1139, 1148 n.18, 59 L.Ed.2d 358 (1979).

Applying these well-established principles to the case before us, we find no basis for the position that the issue of actual malice was determined and foreclosed from reconsideration by the Supreme Court's mandate. The primary issue in *Gertz* was "whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements." 418 U.S. 323, 332, 94 S.Ct. 2997, 3003, 41 L.Ed.2d 789 (1974). The Court answered this question in the negative. The Court also expressly rejected a constitutional privilege for defamatory statements contained in an article on a subject of "public interest." Rather, the Court held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability." *Id.* at 347, 94 S.Ct. at 3010. The Court further stated that the states could only permit compensation for actual injury, and that a showing of actual malice was required to support presumed injury or punitive damages. *Id.* at 349, 94 S.Ct. at 3011-3012. Finally, the Court ruled that Gertz was not a public figure. *Id.* at 352, 94 S.Ct. at 3013. The Court had no difficulty in agreeing with the trial court that Gertz's legal and community activities were not equivalent to "general fame or notoriety," nor had Gertz "thrust himself" into public view in the course of his involvement in the Nelson case so as to make him a public figure.

Thus, the law of the case in *Gertz*, as defined by the issues before the Court, consisted of the Court's guidelines on liability for defamation of private individuals by the media and the Court's further refinement of the public

figure standard. Whether or not actual malice had been proved below simply was not an issue before the Court. The Court did not establish as a matter of law that actual malice had not and could not be proved. To the contrary, the Court's position on liability opened the door to a different standard for the second trial. The Court rejected the "public interest" theory which was the linchpin of the trial court's analysis and of this circuit's opinion.[6] Furthermore, by precluding the states from imposing strict liability, the Court radically changed the burden of proof in defamation cases. *See* 418 U.S. at 369-70, 94 S.Ct. at 3021-3022 (White, J., dissenting). This directly undercut the pretrial rulings below which, pursuant to existing Illinois law, had recognized the statements as libel *per se*, thereby presuming liability and injury. The change wrought by the guidelines adopted in *Gertz* thus totally undermined the legal framework of the first trial.

In recognition of this drastic shift from the standards which governed the first trial, the Court directed a new trial on all issues:

> Because the jury was allowed to impose liability without fault and was permitted to presume damages without proof of injury, a new trial is necessary. We reverse and remand for further proceedings in accord with this opinion.

418 U.S. at 352, 94 S.Ct. at 3013. The Court's mandate clearly includes retrial on all liability issues, including the question of actual malice. The trial court on remand did not misconstrue the Court's decision by permitting the parties to litigate the issue of actual malice.[7]

[6]The Court thus limited *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), to its facts by refusing to extend the "public interest" rationale enunciated in the plurality opinion to all cases involving private individuals.

[7]Welch also contends that no different evidence was offered at the second trial than at the first, and therefore no actual malice was pro-

III

Welch next contends that on remand Gertz failed to prove liability under either a negligence or an actual malice standard. This use of alternative arguments reflects the confusion present in the second trial concerning the correct standard of liability. Gertz's amended complaint alleged both negligence and actual malice as a basis for compensatory and punitive damages. When Welch raised the affirmative defense of reliance on public documents as a basis for the defamatory statements in the article, the trial court interpreted this defense as a claim of conditional or qualified privilege. Under Illinois law, a conditional privilege can only be overcome by proof of actual malice. The court noted the irony of its ruling:

> So, therefore, when I recognize the conditional privilege to exist in this case, it in effect eliminates the possibility of an award of compensatory damages without a showing of actual malice. That is our new standard. It's ironic in a sense we are back to an actual malice standard in the case in light of the landmark ruling in *Gertz and Welch.*

In instructing the jury, the court defined the plaintiff's burden as requiring proof of negligence by a

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en. If this were so, the law of the case doctrine would dictate that the finding of insufficient evidence by the first trial court should apply here if the evidence is substantially the same. 5B C.J.S. *Appeal and Error* § 1964 (1958). 5 Am.Jur.2d, *Appeal and Error* § 748 (1962). That is not the case here, however. The second trial included testimony of several witnesses who did not testify at the first trial, most notably the author of the article, Alan Stang. Furthermore, the testimony of Scott Stanley, Welch's managing editor, and of Gertz himself was considerably more developed at the second trial. Thus the substantial similarity of evidence that would bring the issue within this aspect of the law of the case doctrine is not present.

preponderance of the evidence *and* proof of actual malice by clear and convincing evidence.[8]

We note at the outset that the trial court imposed a more stringent liability standard than was required. Assuming that a conditional privilege was properly recognized in this case, its application was overbroad. Because the trial court required the jury to find *both* negligence *and* actual malice in order to impose liability in this case, however, the jury's verdict served to render this error in the application of the privilege inconsequential.[9] We deem it important, however, to establish the proper standard of liability in this case, and therefore turn to an examination of the court's application of the conditional privilege.

A

The conditional privilege recognized by the trial court was a privilege for statements based on public documents.[10] The author of the *American Opinion* article,

[8]The trial court instructed the jury as follows:

> The plaintiff's claim consists of four essential elements:
>
> First, that the defendant published a magazine article of and concerning the plaintiff which was libelous;
>
> Second, that the defendant was negligent, as that term is explained in these instructions;
>
> Third, that the libelous statements were read by persons other than the plaintiff, namely, members of the general public; and
>
> Fourth, that the libelous statements were published with actual malice, as the term is explained in these instructions.

[9]*See* text accompanying note 17 *infra*.

[10]The trial court based its recognition of a conditional privilege on *Troman v. Wood*, 62 Ill.2d 184, 340 N.E.2d 292 (1975). In *Troman*, which followed the Supreme Court's decision in *Gertz*, the Illinois Supreme Court held that negligence would be the Illinois standard of liability for defamation of private individuals. 62 Ill.2d 198, 340 N.E.2d 292, 299. The court noted, however, that its holding was "not

Alan Stang, testified that he had used government reports as background material for the article and to check the results of his investigation. The managing editor, Scott Stanley, testified that he had "checked the checkables" before publishing the article, that is, he had checked statements against reference materials available to him, including some government reports.[11] On this basis, the trial court apparently found that all the defamatory statements made about Gertz were cloaked in a conditional privilege because of the sources used by the defendants.

Although the trial court did not explicitly identify the privilege which it applied, clearly the court was employing the privilege to report on public proceedings. This privilege permits the reporting of public proceedings in which defamatory statements have been made about private individuals. The privilege also covers republication of reports of an officially-constituted government committee. *Catalano v. Pechous,* 83 Ill.2d 146, 167-68, 50 Ill.Dec. 242, 252-253, 419 N.E.2d 350, 360-61 (1980), *cert. denied,* 451 U.S. 911, 101 S.Ct. 1981, 68 L.Ed.2d 300 (1981); *Lulay v. Peoria Journal-Star, Inc.,* 34 Ill.2d 112, 115, 214 N.E.2d 746, 748 (1966). The defamatory statements made in the course of these proceedings are privileged as long as the republication is "accurate and complete or a fair abridgement of such proceedings."

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intended to remove any of the absolute or qualified privileges which have heretofore been recognized in this State to the extent that the facts may warrant their application." *Id.*

[11]The only specific government reports referred to by Stang and Stanley were the "Guide to Subversive Organizations and Publications"; "Appendix IX", which was identified as reports of the House Select Committee on Un-American Activities under the chairmanship of Representative Dies, published in 1944; and a file document, "National Lawyers' Guild—Foremost Legal Bulwark of the Communist Party", which was identified as a congressional report published in 1951.

Lulay v. Peoria Journal-Star, Inc., 34 Ill.2d 112, 115, 214 N.E.2d 746, 748 (1966). The defamatory statements made in the course of these proceedings are privileged as long as the republication is "accurate and complete or a fair abridgement of such proceedings." *Lulay v. Peoria Journal-Star, Inc.*, 34 Ill.2d 112, 115, 214 N.E.2d 746, 748 (1966). *See Nagib v. News-Sun*, 64 Ill.App.3d 752, 755, 21 Ill. Dec. 567, 570, 381 N.E.2d 1014, 1017 (1978); *Coursey v. Greater Niles Township Publishing Corp.*, 40 Ill.2d 257, 261-62, 239 N.E.2d 837, 839 (1968); restatement (Second) of Torts § 611 (1977).[12] The privilege may

[12]The interest served by the privilege is the public's right to know and be informed of public proceedings. W. Prosser, Handbook of the Law of Torts 830 (4th ed. 1971). *See Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 11, 90 S.Ct. 1537, 1540, 26 L.Ed.2d 6 (1970). Thus, the privilege protects communication which is at the heart of First Amendment concern. *Lulay v. Peoria Journal-Star, Inc.*, 34 Ill.2d 112, 114, 214 N.E.2d 746, 748 (1966); *Watson v. Southwest Messenger Press, Inc.*, 12 Ill.App.3d 968, 972, 299 N.E.2d 409, 412 (1973). The privilege, however, is narrowly confined to reports which are complete and accurate or a fair abridgement of the proceedings. *Id. See* Restatement (Second) of Torts § 611, Comment f (1977). This reflects the nature of the underlying interest. It also reflects a judgment that the speaker or republisher of the defamatory statement has an obligation to publish a fair and complete report, inasmuch as a defamatory statement may be contradicted or mitigated by the totality of the circumstances in which it was uttered.

This interest in public information should be distinguished from the interest in unfettered communication which supports an absolute privilege for the speaker of defamatory statements made in the course of a governmental proceeding. *See* W. Prosser, Handbook of the Law of Torts 781-82 (4th ed. 1971); Restatement (Second) of Torts §§ 588, 590 (1977). The privilege also must be distinguished from the defense of fair comment on matters of public concern, which is sometimes referred to as a privilege. This covers commentary and opinion, but not assertions of fact. *See* W. Prosser, Handbook of the Law of Torts 792, 819-20 (4th ed. 1971). The Restatement (Second) of Torts considers fair comment to be "opinion," and therefore not actionable, so that a privilege is unnecessary. Restatement (Second) of Torts §§ 606-610 (1977).

be overcome, however, by a showing that the publication was motivated by actual malice. *Zeinfeld v. Hayes Freight Lines, Inc.*, 41 Ill.2d 345, 350, 243 N.E.2d 217, 221 (1968). Thus, a publisher is liable if he "knew at the time when the statement was published that it was false, or acted in reckless disregard of its truth or falsity." *Catalano v. Pechous*, 83 Ill.2d 146, 168, 50 Ill.Dec. 242, 253, 419 N.E.2d 350, 361 (1980), *cert. denied*, 451 U.S. 911, 101 S.Ct. 1981, 68 L.Ed.2d 300 (1981).[13]

The case before us differs considerably from those cases in which the privilege has previously been applied. Those cases have generally involved a newspaper or magazine which, relatively contemporaneous with the public proceeding, published an account of the proceeding in an article focusing on the proceeding. *See e.g., Coursey v. Greater Niles Township Publishing Corp.*, 40 Ill.2d 257,

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[13] *Catalano v. Pechous*, 83 Ill.2d 146, 50 Ill. Dec. 242, 419 N.E.2d 350 (1980), *cert. denied*, 451 U.S. 911, 101 S.Ct. 1981, 68 L.Ed.2d 300 (1981), appears to have adopted the *New York Times* definition of actual malice as the actual malice necessary to overcome a conditional privilege. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 280, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964). This obviates the possible difference between common law malice and the constitutional standard which could require a confusing differentiation in the standard of proof and liability depending on which type of "malice" is at issue. *See, e.g., Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 251-52, 95 S.Ct. 465, 469-470, 42 L.Ed.2d 419 (1974); Restatement (Second) of Torts § 592A, Special Note on Conditional Privileges and the Constitutional Requirement of Fault (1977). This would also suggest that the standard of proof for actual malice to support punitive damages would be harmonious with the *New York Times* standard. *See Newell v. Field Enterprises*, 91 Ill.App.3d 735, 756, 47 Ill.Dec. 429, 446, 415 N.E.2d 434, 451 (1980); *Fopay v. Noveroske*, 31 Ill.App.3d 182, 197, 334 N.E.2d 79, 92 (1975). *Cf. Tunnell v. Edwardsville Intelligence, Inc.*, 43 Ill.2d 239, 252 N.E.2d 538 (1969), *cert. denied*, 397 U.S. 1021, 90 S.Ct. 1259, 25 L.Ed.2d 530 (1970) (no distinction between liability standard of actual malice for public official and punitive damages standard of actual malice).

239 N.E.2d 837 (1968); *Nagib v. News-Sun*, 64 Ill.App.3d 752, 21 Ill.Dec. 567, 381 N.E.2d 1014 (1978); *Segall v. Lindsay-Schaub Newspapers, Inc.*, 68 Ill.App.2d 209, 215 N.E.2d 295 (1966). Here, however, the article neither focused on the public proceedings which are claimed as the source of the privilege, nor was the article contemporaneous with those proceedings. The proceedings were reports of congressional committees published in the 1940's and 1950's. The activities of those committees were not the subject of the article, but rather the committees' reports were cited in, or used as a basis for, particular sentences. The Illinois decisions do not indicate whether the privilege should apply when public proceedings are reported on in this matter. *See Catalano v. Pechous*, 83 Ill.2d 146, 168, 50 Ill.Dec. 242, 252-253, 419 N.E.2d 350, 360-61 (1980), *cert. denied*, 451 U.S. 911, 101 S.Ct. 1981, 68 L.Ed.2d 300 (1981) (refusal to rule whether length of time before republication, and other factors, would affect privilege). *Cf. Coursey v. Greater Niles Township Publishing Corp.*, 40 Ill.2d 257, 262, 239 N.E.2d 837, 839-40 (1968) (strict application of privilege when failure to report dismissal of one charge against policeman directly affected defamatory statement). Although the applicability of the privilege to these defamatory statements is far from certain in this case, we assume, without deciding, that the privilege could be applied under these circumstances.

Even assuming the privilege was properly invoked in this case, we find that the district court's application of the privilege was overbroad. First, the court appeared to extend the privilege for *reporting on* government proceedings to cover articles *relying on* reports of government proceedings. We have found no Illinois case to support such an interpretation of the privilege. Where a

publisher merely reports a statement, states it fairly, and does not modify or misstate the statement, the privilege is applicable, provided there is no actual malice. Where, on the other hand, a statement in the record of a public proceeding is merely part of one's research, and is used to support an assertion not made in the public document, the privilege does not apply. Rather, in the latter situation, whether there is liability for the republication of the statement should be judged by the reasonableness of reliance upon the public document. *See Troman v. Wood,* 62 Ill.2d 184, 198, 340 N.E.2d 292, 299 (1975).

At trial, Stang claimed that he checked "government reports" to determine the nature of the organizations and activities listed in Gertz's police intelligence file.[14] The reports he named in his testimony were "Appendix IX," "Guide to Subversive Organizations," and "National

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[14]Stang identified nine articles which he used as background material for the article, none of which were government documents and none of which were used as sources for his specific statements about Gertz. Four of the articles were reprints from the Congressional Record of articles placed in the record by various Congressmen. None of these articles, however, were in the nature of verbatim transcripts of speeches; rather, they were articles published in other publications. One article was authored by Senator Byrd but there was no indication in the record that article was published pursuant to any official proceedings. Republication in the Congressional Record does not make any of these articles privileged. *See* Restatement (Second) of Torts § 611, Comment d (1977); 50 Am.Jur.2d, *Libel and Slander* § 221.

Stang testified that most of his information about Gertz came from a "big Irish cop," who was not identified at trial, who provided him with notes culled from Gertz's Chicago Police Department intelligence file. A secret police file hardly qualifies as a report on a public proceeding. Nor does the repetition of this information by a public official, a police officer, make this a report of a public proceeding. *See* W. Prosser, Handbook of the Law of Torts 831 (4th ed. 1971); 53 C.J.S. *Libel and Slander,* § 129 at 210 (1948). *See also* 50 Am.Jur.2d *Libel and Slander* § 264 (1970).

Lawyers' Guild – Foremost Legal Bulwark of the Communist party."[15] The only statement made about Gertz in any of those documents was that he had been a member of the National Lawyers' Guild from the 1930's to 1950. Other than that "fact," which Stang may not have reported accurately,[16] there were no other statements about Gertz in these government reports. Thus, Stang *relied* on those reports to characterize as Communist the organizations which he claimed that Gertz belonged to, which claim was, in turn, based on Stang's *reliance* on material from the police intelligence file. The same three documents identified by Stang were the only documents used by Stanley when he "checked the checkables." Again, only Gertz's past membership in the National Lawyers' Guild could be verified in those documents. Otherwise, Stanley testified, he relied on Stang. Thus, government documents were primarily relied upon, not reported on, for this article.

Second, any application of the privilege should have been limited to those statements about Gertz that were actually checked against these documents. Instead, the trial court applied the privilege to the entire article. This might have been appropriate had the focus of the article, or even a substantial section of the article, been upon the congressional committee proceedings which were the basis of the public reports. Application of the privilege to the entire article was not appropriate here, however, where the reports were used only to verify certain statements.

Thus, only those statements which were fair and accurate republications of statements made in the government documents were covered by the privilege. These

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[15] *See* note 11, *supra*.

[16] Stang made no effort to determine if Gertz was still a member of the Guild nor did he limit the statement in the article to 1950.

statements had to be published with actual malice in order to be the basis of liability. The remaining defamatory statements in the article, however, could be the basis of liability if they were published as a result of negligence.

The jury below, however, was required to find that negligence *and* actual malice were proved in order to find liability. This higher burden of proof than was actually required in no way undermines the jury's verdict. If the standard of actual malice was satisfied, then by definition an intentional breach of duty occurred, thus more than satisfying the negligence standard where that was applicable.[17]

B

The *New York Times* actual malice standard is deceptively simple: knowing falsity or reckless disregard of the truth or falsity of the defamatory statement. *New York Times Co. v. Sullivan,* 376 U.S. 254, 280, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964). *See also Garrison v. Louisiana,* 379 U.S. 64, 79, 85 S.Ct. 209, 218, 13 L.Ed.2d 125 (1964). Recklessness means that the publisher "in fact entertained serious doubts as to the truth of his publication," *St. Amant v. Thompson,* 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968), or had a "subjective awareness of probable falsity." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 335 n.6, 94 S.Ct. 2997, 3005

[17]The negligence standard for defamation of a private individual was summarized by the Illinois Supreme Court as follows:

> [R]ecovery may be had upon proof that the publication was false, and that the defendant either knew it to be false, or, believing it to be true, lacked reasonable grounds for that belief. . . . [N]egligence may form the basis of liability regardless of whether or not the publication in question related to a matter of public or general interest.

Troman v. Wood, 62 Ill.2d 184, 198, 340 N.E.2d 292, 299 (1975). This standard clearly would be subsumed in a finding of actual malice.

n.6, 41 L.Ed.2d 789 (1974). This standard makes it "essential to proving liability that the plaintiff focus on the conduct and state of mind of the defendant." *Herbert v. Lando*, 441 U.S. 153, 160, 99 S.Ct. 1635, 1640, 60 L.Ed.2d 115 (1979). Although a publisher does not have an absolute duty to investigate, *St. Amant v. Thompson*, 390 U.S. 727, 733, 88 S.Ct. 1323, 1326, 20 L.Ed.2d 262 (1968), a publisher cannot feign ignorance or profess good faith when there are clear indications present which bring into question the truth or falsity of defamatory statements. A publisher cannot

> automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, . . . when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found *where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.*

St. Amant v. Thompson, 390 U.S. 727, 732, 88 S.Ct. 1323, 1326, 20 L.Ed.2d 262 (footnote omitted) (emphasis added). *See also Curtis Publishing Co. v. Butts*, 388 U.S. 130, 169-70, 87 S.Ct. 1975, 1998-1999, 18 L.Ed.2d 1094 (1967) (Warren, C. J., concurring); *Carson v. Allied News Co.*, 529 F.2d 206, 211 (7th Cir. 1976); *Grzelak v. Calumet Publishing Co.*, 543 F.2d 579, 582 (7th Cir. 1975); *Fadell v. Minneapolis Star & Tribune Co.*, 425 F.Supp. 1075, 1084-85 (N.D.Ind.1976), *aff'd*, 557 F.2d 107 (7th Cir.), *cert. denied*, 434 U.S. 966, 98 S.Ct. 508, 54 L.Ed.2d 452 (1977).

The evidence in this case clearly established that the publisher had "obvious reasons to doubt the veracity . . . or accuracy" of the author of the defamatory statements, and conducted only the most perfunctory investigation of the truth or falsity of the statements in the article. Stang was not unknown to Stanley; to the contrary, he had written articles for various John Birch Society publications since 1963, was a contributing editor to the Society's magazine, and had written two books published by the Society. Some of these prior writings had been edited by Stanley and Stanley was aware of the general content of all of them. Invariably, Stang had labeled someone a Communist in these writings. Among the diverse persons and organizations identified as Marxist, Communist, or under Communist control were Richard Nixon, John Foster Dulles, U Thant, Hubert Humphrey, Pierre Trudeau, Dr. Martin Luther King, and the Democratic Party.

Furthermore, Stanley solicited the article. The article was Stanley's idea, not Stang's. Stanley had contacted Stang and told him that a Chicago policeman was being railroaded for murder, part of the nationwide Communist conspiracy to discredit police. Stanley asked Stang to go to Chicago to investigate and write an article about this. Stanley also provided Stang with background materials for the article.

Stanley submitted the article for typesetting only three to four hours after it was received. The usual editing time of several weeks or more was shortcut because Stanley wanted the article in the April issue of *American Opinion*, and the internal preparation printer's deadline fell on the day after the article came in. The time was foreshortened, therefore, not because this was "hot news" but rather because of editorial preference and prior planning. In those three to four hours, Stanley edited the article and

"checked the checkables" – the latter being his only effort to verify the statements made in the article. This check verified only that Gertz had been a member of the National Lawyers' Guild from the 1930's to 1950, and that the Lawyers' Guild was identified as a Communist-front organization by a report of the House Committee on Un-American Activities. Stanley made no effort to update this information, nor to examine any other available sources of information about Gertz. Instead, he obtained a photograph of Gertz from the *Chicago Tribune* and captioned it "Elmer Gertz of Red Guild harasses Nuccio." He also wrote the title of the article, a note on the author, and a comment on the inside front cover of the April issue urging readers to examine Stang's story.[18]

In summary, Stanley conceived of a story line; solicited Stang, a writer with a known and unreasonable propensity to label persons or organizations as Communist, to write the article; and after the article was submitted, made virtually no effort to check the validity of statements that were defamatory *per se* of Gertz, and in fact added further defamatory material based on Stang's "facts." There was more than enough evidence for the jury to conclude that this article was published with utter disregard for the truth or falsity of the statements contained in the article about

[18] Stanley's endorsement read, in part:

> [W]e do know that when *American Opinion's* Alan Stang goes after the facts in a story he gets them – just as he has, again, in the very important article beginning on page one.
>
> Mr. Stang reports this month on the framing for murder of an outstanding Chicago police officer – a man with no less than twenty-six formal citations for the excellence of his police work. That this is a part of the Communist war on our police is as certain as the innocence of the officer they have chosen as their symbolic target. So important is this one, in fact, that reprints will be made immediately available.

Gertz.[19] "Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers." *Curtis Publishing Co. v. Butts,* 388 U.S. 130,

[19]Furthermore, Stang's conduct in investigating and researching the article also is evidence of actual malice. Stang's conduct is attributable to Welch because of the agency relationship between them. Stang was solicited to write this specific article, was given the story line and background material, was reimbursed for his expenses, and kept in contact with Stanley during the preparation of the article. These facts, particularly the significant control exercised by Stanley over the content and focus of the article, are sufficient to establish an agency relationship. *See City of Evanston v. Piotrowicz,* 20 Ill.2d 512, 518-19, 170 N.E.2d 569, 573 (1960); *Johnston v. Suckow,* 55 Ill.App.3d 277, 280, 12 Ill.Dec. 846, 849, 370 N.E.2d 650, 653 (1977); *Reith v. Gen. Tel. Co.,* 22 Ill.App.3d 337, 339, 317 N.E.2d 369, 372 (1974). The implications of that relationship are that the acts of the agent are attributable to the principal. *Gomien v. Wear-Ever Aluminum, Inc.,* 50 Ill.2d 19, 21, 276 N.E.2d 336, 338 (1971); *Windsor Lake, Inc. v. WROK,* 94 Ill.App.2d 403, 410, 236 N.E.2d 913, 917 (1968).

Stang's research for this article was akin to the "slipshod and sketchy investigatory techniques" condemned in *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 169-70, 87 S.Ct. 1975, 1998-1999, 18 L.Ed.2d 1094 (1967) (Warren, C. J., concurring). Stang visited Chicago twice to research the article. None of the persons he interviewed told him that Gertz had been involved in the criminal prosecution of Nuccio. He did not interview any of the lawyers involved in the criminal or civil actions against Nuccio. He read the transcript of Nuccio's criminal trial and looked at the pleadings filed in the civil case, which had the names of Gertz and Ralla Klepak on them. He also talked to an unnamed Chicago police officer who gave him notes taken from Gertz's police intelligence file. Stang admitted at trial, however, that he had no knowledge of the source of the information in the files or whether the information was accurate. Stang also testified that he consulted government documents about the organizations listed in Gertz's police intelligence file. This was not an exhaustive search of government records, but rather a selective use of particular reports of certain congressional committees published twenty to thirty years earlier. The only facts verified in these reports were Gertz's membership in the National Lawyers' Guild to 1950, and that the Guild had been identified as a Communist-front organization. Stang made no effort to find out if Gertz was still a member of the Guild, nor did he attempt to contact or interview Gertz.

170, 87 S.Ct. 1975, 1999, 18 L.Ed.2d 1094 (1967) (Warren, C. J., concurring).

The evidence, therefore, supports the jury's finding of actual malice. To the extent that the conditional privilege for reports of government proceedings attaches to this case, it was overcome by a showing of abuse of the privilege. The evidence of actual malice subsumes a breach of duty which satisfies the negligence standard applicable to the bulk of the defamatory statements made in the article. Finally, the finding of actual malice provided the necessary predicate for the award of punitive damages.

IV

The remaining issues raised by Welch relate to damages. First, Welch argues that the jury instructions on actual malice and punitive damages tainted the jury's award of compensatory damages.[20] Welch speculates that because the jury had to find actual malice in order to award either compensatory or punitive damages, the jury was unable to separate its determinations and awarded excessive compensatory damages based on its distaste for the publisher's conduct. The jury instructions, however, clear ly separated compensatory and punitive damages, and there is no indication in the record that the jury had any difficulty following those instructions. Nor is the implication that the compensatory damages award was excessive borne out by the record. "The determination of an adequate verdict is peculiarly within the province of the jury and great weight must be given to its determination." *Ball*

[20] As part of this argument, Welch also contends that the issue of actual malice should never have gone to the jury. We repeat our conclusion that the evidence was sufficient to submit the issue of actual malice to the jury. *See* Part III, *supra*.

v. Continental Southern Lines, Inc., 45 Ill.App.3d 827, 831, 4 Ill.Dec. 334, 337, 360 N.E.2d 81, 84 (1977). We find no basis here to disturb the jury's verdict.

Second, Welch argues the award of compensatory damages was improper because there was no proof of actual injury. The short answer to this contention is that because there was evidence of actual malice in the publication of the defamatory statements, which were libel *per se*, Illinois law would permit, and the Constitution would not prohibit, presumed damages. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349, 94 S.Ct. 2997, 3011, 3012, 41 L.Ed.2d 789 (1974); *Carson v. Allied News Co.*, 529 F.2d 206, 214 (7th Cir. 1976); *Newell v. Field Enterprises, Inc.*, 91 Ill.App.3d 735, 741-42, 47 Ill.Dec. 429, 436, 415 N.E.2d 434, 441 (1980).

Nonetheless, Gertz has proved actual injury in this case. Gertz testified to the severe mental distress, anxiety and embarrassment which he suffered as a result of the article. Several attorneys testified at trial that calling a lawyer a Communist would be highly injurious to professional reputation. One witness, Albert Jenner, testified that he had heard the defamatory statements about Gertz repeated.

The Supreme Court has recognized that actual injury in defamation cases is not solely measured by out-of-pocket economic loss. "Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S.Ct. 2997, 3012, 41 L.Ed.2d 789 (1974). This kind of actual injury was clearly established by the evidence presented at trial.

Therefore, because we find no merit in the issues raised on appeal, the judgment of the trial court is

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ELMER GERTZ,	)	
Plaintiff,	)	
v.	)	69 C 1288
	)	
ROBERT WELCH,	)	
Defendant.	)	

MEMORANDUM OPINION

JOEL M. FLAUM, District Judge:

Before the court is plaintiff's motion for reconsideration of the court's June 7, 1977 opinion denying plaintiff's motion for summary judgment as to the issue of truth. Since the plaintiff now argues that the defendant is bound by certain judicial admissions it made during the course of the first trial of this litigation, this court grants plaintiff's motion and grants summary judgment in behalf of the plaintiff as to the issue of truth. *See* Fed. R. Civ. P. 56(d).

In its earlier pleadings and closing argument in the first trial, defendant conceded that the plaintiff was not in fact a communist and not involved in a conspiracy to frame Officer Nuccio. Such judicial admissions are binding on the defendant on retrial. "As a general rule the pleading of a party made in another action, as well as pleadings made in the same action which have been superseded by amendment, withdrawn or dismissed, are admissible as admissions of the pleading party to the facts alleged therein,

assuming of course that the usual tests of relevancy are met." *Continental Insurance Company of New York v. Sherman,* 439 F.2d 1294, 1298 (5th Cir. 1971). *See also Sanitary Milk Producers v. Bergians Farm Dairy, Inc.,* 368 F.2d 679 (8th Cir. 1966); *Ross v. Philip Morris & Co.,* 328 F.2d 3 (8th Cir. 1964); *Frank R. Jelleff, Inc. v. Braden,* 233 F.2d 671 (D.C. Cir. 1956); 9 Wigmore on Evidence ¶ 2593, at 593 (3d ed. 1940).

Further, such admissions have been held to be conclusive. "The vital feature of a judicial admission is universally conceded to be its *conclusiveness* upon the party making it, i.e., the prohibition of any further dispute of the fact by him, and any use of evidence to disprove or contradict it." 9 Wigmore on Evidence ¶ 2590, at 587. *See Hill v. FTC,* 124 F.2d 104, 106 (5th Cir. 1941).

Accordingly, since defendant admitted in his earlier pleadings and closing argument that published statements concerning the plaintiff were in fact false he cannot now raise the issue of truth. Therefore, when this cause comes before the court on retrial, the evidence concerning liability will be limited to the issues of negligence and the existence of malice.

It is so ordered.

/s/

United States District Judge

Dated: February 15, 1978

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ELMER GERTZ,	)	
Plaintiff,	)	
v.	)	69 C 1288
	)	
ROBERT WELCH, INC.,	)	
Defendant.	)	

MEMORANDUM OPINION

JOEL M. FLAUM, District Judge:

This diversity libel action is before the court on the parties' cross motions for summary judgment pursuant to Fed. R. Civ. P. 56. The plaintiff, an attorney, represented in some civil litigation the family of a youth who was killed by a Chicago policeman. The police officer was later convicted of murder for the youth's death. In March of 1969, the defendant published an article which stated that the policeman had been a victim of a communist conspiracy to frame him for the murder. The article claimed that a participant in this conspiracy was the plaintiff. Following a trial in the Northern District of Illinois and review to the Supreme Court, the case was remanded to this court for a new trial.[1]

The parties in their motions raise four issues: (1) Whether the plaintiff is a public figure; (2) whether the

[1] For a more complete statement of the facts of this case, see Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

facts of the article are a true statement of Gertz's political leanings and his participation in the alleged plot: (3) whether, pursuant to Illinois law, the defendant was negligent in its publication of the article; and (4) whether the defendant acted with actual knowledge of falsehood or with reckless disregard of the truth, thereby justifying punitive damages under Illinois law. For reasons stated *infra,* the cross motions are denied except as to the public figure issue on which summary judgment is entered for the plaintiff. See Fed. R. Civ. P. 56(d).

In spite of the fact that the Supreme Court held that under the facts of this case Gertz was not a public figure[2] and that the doctrine of *New York Times v. Sullivan,* 376 U.S. 254 (1964) did not apply, the defendant has again raised the issue here. However, he is foreclosed from doing so. The determination by the Supreme Court is binding of the trial court as law of the case. It is well settled that a lower court with jurisdiction over a case on remand under a Supreme Court mandate is foreclosed from reconsidering matters decided by the Supreme Court. *Sibbald v. United States,* 37 U.S. (12 Pet.) 487 (1838); *Poletti v. Commissioner,* 351 F.2d 345 (8th Cir. 1965); *Sherwin v. Welch,* 319 F.2d 729 (D.C. Cir. 1963); *Connett v. City of Jerseyville,* 110 F.2d 1015 (7th Cir. 1940); 1B Moore's Federal Practice ¶ 0.404 [10], at 571 (2d ed.). Since the Supreme Court settled the public figure issue on plaintiff's behalf, the defendant herein is foreclosed from raising it now. *See Gertz v. Welch,* 418 U.S. 323, 351-52 (1974).[3]

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[2] *See id.* at 351-52.

[3] Further, the court finds after an independent review of the record that the defendant offers no additional evidence which would support its contention that Gertz is in fact a public figure.

The law of the case doctrine extends only to matters expressly covered by the appellate court. It is equally well settled, however, that in a case which has been reversed and remanded for further proceedings all other issues are to be decided as if the former trial had not taken place. *Sprague v. Ticonic National Bank,* 307 U.S. 161 (1939); *United States ex rel. Johnson v. Johnson,* 531 F.2d 169 (3rd Cir.), *cert. denied,* 425 U.S. 997 (1976). Liability on the negligence and malice counts is therefore not foreclosed from the court's consideration.

The substantive law of Illinois must be applied with respect to the merits of the libel claim. *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938); *Guaranty Trust Co. of New York v. York,* 326 U.S. 99 (1945). The relevant Illinois case which sets forth the standard by which the defendant is to be judged is *Troman v. Wood,* 62 Ill. 2d 184, 340 N.E. 2d 292 (1975). In *Troman,* the court adopted a negligence standard. On a motion for summary judgment the court will find the defendant liable when the proof shows "that the publication was false, and that the defendant either knew it to be false, or, believing it to be true, lacked reasonable grounds for that belief." 62 Ill. at 198, 340 N.E. 2d at 299. The failure by a reporter to make an investigation into the truth of the matter is a factor in the determination as to whether the defendant has been negligent in its publication. *Id.* at 197, 340 N.E. 2d at 298. *See Oberman v. Dun & Bradstreet, Inc.,* 460 F.2d 1381 (7th Cir. 1972).

In considering whether summary judgment is an appropriate disposition in this case, the court is mindful of the general principle that summary judgment is rarely appropriate in a negligence action. "Even when the facts underlying the issue of negligence are undisputed, the issue must still be submitted to the jury if reasonable men could

reach different conclusions and inferences from those facts." *Croley v. Matson Nav. Co.*, 434 F.2d 73, 75 (5th Cir. 1970).

In general, the plaintiff bases his action on two alleged false statements. First, the plaintiff complains that the defendant has falsely alleged that the plaintiff is a "communist-fronter" and that he espouses views of a Leninist or Marxist orientation. Second, plaintiff complains that the defendant falsely accused him of participating in a communist conspiracy to frame the police officer.[4] The court should grant a motion for summary judgment where it is shown that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *Hanke v. Global Van Lines, Inc.*, 533 F.2d 396 (10th Cir. 1976).

The court finds that there is a genuine issue of material fact as to whether the defendant had reasonable grounds to believe that these statements were true. Upon examination of the affidavits and the court record, the evidence shows that in the preparation of the article the reporter, Stang, substantially relied on hearsay statements from news clippings, individuals connected with the policeman's case as well as on governmental publications. The managing editor of the *American Opinion* which published the article stated in the article's introduction that the journalist had done "extensive research" into the case. He also reviewed the transcript of the police officer's first trial.

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[4]The defendant also implied that the plaintiff had a criminal record by stating that a police file on Gertz took "a big, Irish cop to lift." The record indicates that Stang, the author of the article, consulted a Chicago policeman who had reviewed the "file." The plaintiff has denied its existence. An issue of fact as to the file's existence and its effect is therefore raised.

According to his deposition, he consulted at least nine people who were connected with the case in some manner.

However, Stang failed to contact the plaintiff himself in reference to the case. He further admitted that he did not know whether the plaintiff had any involvement in the criminal case against the police officer.[5] In concluding that the plaintiff was involved in communist "front" organizations, Stang relied on a House of Representatives committee report which identified certain organizations of which Gertz had been a member as "subversive." Whether such reliance provided the defendant reasonable grounds to believe that the facts as published were not true is a question which must be decided by the trier of fact.

An additional issue as to liability is whether the allegations were in fact false. Gertz testified at the first trial of this case that he never espoused any communist doctrines and that he has never belonged to a communist organization. The defendant seeks to contradict this by arguing that Gertz's alleged association with alleged communist organizations demonstrate that he was in fact a communist. An issue of fact is therefore raised by the parties.

The foregoing considerations are relevant to the issue of malice. It appears that punitive damages may be recovered in Illinois when there is a showing of actual malice. *See Troman v. Wood*, 62 Ill. 2d at 192, 340 N.E. 2d at 296. *See also Milsaps v. Bankers Life Co.*, 35 Ill. App. 3d 735, 744, 342 N.E. 2d 329, 336 (1976). Since the court finds that a genuine issue of material facts exists as to whether the

[5]This admission which was made during a deposition of Stang is ambiguous. The question and answer indicate that Stang conceded that he had no knowledge that Gertz actively participated in the criminal case of Nuccio. However, the statement does not clearly indicate that Stang had no evidence of participation in an alleged behind-the-scenes conspiracy as alleged by the plaintiff.

defendant might have acted with reckless disregard for the truth or actually knew of the falsity of its statements, the motions for summary judgment on the malice issue are also denied.

Accordingly, the parties motions for summary judgment as to the issues of truth, negligence, and the existence of malice are hereby denied. Plaintiff's motion for summary judgment as to the public figure issue is hereby granted.

It is so ordered.

/s/

United States District Judge

Dated: June 7, 1977

APPENDIX E

Elmer GERTZ, *Plaintiff-Appellant,*

v.

ROBERT WELCH, INC., *Defendant-Appellee.*

Elmer GERTZ, *Plaintiff-Appellee,*

v.

ROBERT WELCH, INC., *Defendant-Appellant.*

Nos. 71-1174, 71-1175

United States Court of Appeals,
Seventh Circuit

Argued Jan. 31, 1971.

Decided Aug. 1, 1972.

Rehearing and Rehearing En Banc
Denied Sept. 7, 1972.

* * *

Wayne B. Giampietro, Elmer Gertz, Chicago, Ill., for Gertz.

James A. Boyle, Jr., Chicago, Ill., Clyde J. Watts, Oklahoma City, Okl., for Welch.

Before KNOCH, Senior Circuit Judge, and KILEY and STEVENS, Circuit Judges.

STEVENS, Circuit Judge.

Plaintiff's appeal[1] from an order, 322 F.Supp. 997, entering judgment in favor of defendant notwithstanding the jury's $50,000 verdict presents two questions: (1) whether the First Amendment privilege as construed in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, protects defendant's false and scurrilous comments about the plaintiff; and (2) if the privilege does apply, was the evidence insufficient to permit the jury to find that defendant's comments were made "with 'actual malice'— that is, with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." Id. at 279-280, 84 S.Ct. at 726.

Plaintiff is a reputable lawyer. Defendant published an article describing him as a "Communist-fronter," "Leninist," and participant in various "Marxist" and "Red" activities. The author of the article is not a party and did not testify. We assume, without deciding, that, as the district court held, the article was libelous *per se* as a matter of Illinois law and that its author was either deliberately or recklessly mendacious. Our concern is with the tension between the responsibility and the First Amendment freedom of the publisher.

I.

The libel was published in the April 1969 edition of *American Opinion*. The magazine's managing editor, one Stanley, explained its editorial policy, method of operation, and how the libelous article was commissioned.

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[1]Defendant cross appeals in No. 71-1175. Our disposition of plaintiff's appeal in No. 71-1174 makes it unnecessary to consider or decide any of the issues raised in the cross appeal.

Early in the 1960s, in furtherance of the aims of the John Birch Society, *American Opinion*, and an affiliated publication also edited by Stanley, began to promulgate "information" about a "nation-wide conspiracy to harass and intimidate the police." *American Opinion* published many articles by a number of different authors on this subject. One of them was Alan Stang, the contributor of the libel in suit. Stang was never employed by defendant or any of its affiliates, but had been a regular contributor since 1963. He was recommended to Stanley as an "accurate researcher and analyst" with professional training and experience.[2] His services were engaged by Stanley for special assignments consistent with the aims of the John Birch Society. Between 1963 and 1969 he wrote about 35 articles for Stanley.

Although Stang's articles provoked many letters, some strongly adverse, according to Stanley none challenged the

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[2]In his affidavit in support of defendant's motion for summary judgment, Stanley stated in part:

> "6. My first acquaintance with Allen Stang [*sic*] came as a result of the personal recommendations of two men. They are, Samuel L. Blumenfeld, an editor formerly with Rinehart & Company, the Viking Press, The World Publishing Company, and Grosset & Dunlap. The other person recommending Mr. Stang was Noel E. Parmentel who was an essayist for several publications, among which were the *New Yorker, Esquire* and *National Review*. He was also a television writer and producer. Both Mr. Blumenfeld and Mr. Parmentel stressed Mr. Stang's ability as an accurate researcher and analyst.
>
> "7. I was also advised that Allen Stang [*sic*] held an B.A. degree from City College of New York and a Masters degree from Columbia University. Further, that he was a business editor for Prentice-Hall Inc. and was a professional writer and researcher for NBC and for such network features as *Mike Wallace Interview* and *Biography*."

truth of any of Stang's factual averments. Prior to the article in suit, none was the subject of a demand for retraction or a libel suit.

In December, 1968, Stanley requested Stang to prepare an article on the murder trial of a Chicago police officer named Nuccio. Stang accepted, came to Chicago to make an investigation, consulted with Stanley over the long distance telephone a few times, and submitted his completed draft on February 18, 1969, in time for inclusion in the April edition which was scheduled for distribution in early March. Stanley made no effort to verify the accuracy of anything said in Stang's article. Based on statements in the text, Stanley drafted an introductory comment[3] and captions for illustrations.[4] Before the article was conceived, Stanley, whose office is in Boston, had never heard of the plaintiff.

The article is 18 pages long. It is concerned with the trial and conviction of officer Nuccio for the crime of murdering a 17-year old boy named Nelson. The article is intended to persuade the reader that Nuccio was the victim of a "frame-up and that the frame-up was part of a national conspiracy to discredit local police forces; the purpose of that conspiracy is to lay the groundwork for the

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[3]"Alan Stang is a former business editor for Prentice-Hall, Inc., and a television writer, producer, and consultant. Mr. Stang is a frequent contributor to AMERICAN OPINION and is author of the Western Islands best-sellers, *It's Very Simple* and *The Actor*. Alan Stang has just returned from an investigative trip to Chicago, where he conducted extensive research into the Richard Nuccio Case."

[4]For example:
"Officer Richard Nuccio, shown here with one of his three children, was framed for murder"; and "Elmer Gertz of Red Guild Harasses Nuccio."

creation of a national police force, which, in turn, is a step toward a totalitarian state.

The article purports to analyze the evidence against Nuccio so incisively that the falsity of several witnesses' testimony at Nuccio's trial, and the error of the trial judge's finding of guilt, will be manifest to the reader.[5]

Plaintiff is mentioned because he was retained by the Nelson family to assert a civil claim for damages against Nuccio. In that capacity, he attended the coroner's inquest into Nelson's death. Notwithstanding his limited, professional interest in the matter, the article implied that plaintiff was the architect of a gross miscarriage of justice. A purported relationship to a nationwide conspiracy was suggested, in part, by frequent references to the National Lawyers Guild, of which plaintiff had been a member and which Stang repeatedly described as a Communist front.

About 42,000 copies of the magazine were distributed nationally and about 86,000 reprints were printed, of which about 5,000 were sold or given away in Illinois. The article came to plaintiff's attention because a copy was handed to his partner's wife while she was shopping. He

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[5]The district court summarized the article:

> "A closer examination of the article shows that its theme was more general and far reaching than just the trial of one Chicago policeman for murder. Instead, it painted the picture of a conspiratorial war being waged by the Communists against the police in general. Caught up in the web of the alleged conspiracy, aside from Gertz, was such a disparate cast of characters as the Lake View Citizens Council, the Walker Report, a Roman Catholic priest, and the Chicago *Seed* (an underground newspaper). In fact, although Gertz's picture was displayed in the body of the article, he did not play a very prominent role in the article's exposé of the purported war on police."

promptly filed this libel action in the federal court, alleging that various statements in the article were false and defamatory.

Ruling on various pretrial motions, the district court held as a matter of law that the publication was libelous *per se,* and that applicability of the *New York Times* standard depended on issues of fact that could not be resolved on summary judgment.

At the trial plaintiff established that defendant had made no independent verification of any of the statements in Stang's article, that critical comments about plaintiff were false and unsupported, and that plaintiff was a well known and well regarded member of the Illinois bar.[6] Defendant sought to prove that it was justified, on the basis of past experience, in assuming, without checking before publishing it, that Stang's article was accurate. Defendant also offered to prove that it did in good faith seek to verify the statements about plaintiff after the suit was filed, but the court sustained plaintiff's objection to the relevance of this testimony.

No proof of actual damages was offered. Under the court's instructions, the jury was permitted to presume injury as a matter of law. As noted, it assessed plaintiff's damages at $50,000. The district court set aside the verdict

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[6]The district court stated:

> "At trial, Gertz testified as to his stature and reputation in the community. He is a prominent attorney in Chicago, having represented clients who sometimes command a wide following in the press and media. He has written books, articles and reviews which have enjoyed wide circulation. He has appeared frequently on radio and television, and has delivered numerous speeches. And he has long been involved in civic affairs."

and granted defendant's motion for judgment n.o.v. In a thorough memorandum, the court concluded that even if plaintiff himself was not a public figure, the subject matter of the article was clearly of public interest,[7] and that although defendant's failure to check the accuracy of the article was negligent, the evidence presented at the trial was not sufficient to support a finding of actual malice or reckless disregard for the truth.

II.

Plaintiff's principal contention on appeal is that the standard of New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, is inapplicable because he is not a public figure and, insofar as the article related to him, it did not concern a matter of public interest.

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[7]"By analogy to the above cases, and to those cited in Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, at 861, n. 4 [(5th Cir. 1970)], I think that the subject matter of 'Frame-Up' was clearly of public interest protected by the First and Fourteenth Amendments. A Chicago policeman's killing of a criminal suspect, and the policeman's subsequent indictment for murder at a time when the police generally were the subject of attacks within the community, commanded wide public attention and interest. By representing the victim's family in litigation brought against the policeman, Gertz thrust himself into the vortex of this important public controversy. Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 at 155, 87 S.Ct. at 1991. In affording First Amendment protection to defendant's publication, I reiterate that Gertz played a small part in the vast sweep of the whole article. What this court concerns itself with primarily is the public's right to become informed on a matter of public interest, rather than with any right to know about persons who have injected themselves into the limelight on that matter. See United Medical Laboratories v. Columbia Broadcasting System, 404 F.2d 706 at 712 [(9th Cir. 1968), cert. denied, 394 U.S. 921, 89 S.Ct. 1197, 22 L.Ed.2d 454]. The penumbra of First Amendment protection falls equally on references to Gertz, the Lake View Citizens Council, the policeman charged with murder, and the Chicago *Seed*."

Plaintiff's considerable stature as a lawyer, author, lecturer, and participant in matters of public import undermine the validity of the assumption that he is not a "public figure" as that term has been used by the progeny of *New York Times*. Nevertheless, for purposes of decision we make that assumption and test the availability of the claim of privilege by the subject matter of the article. The question then is whether the article, taken as a whole, and more narrowly in its references to plaintiff, is of any *significant* public interest.[8]

Considering either the article's specific topic—the trial of a Chicago police officer for the crime of murder—or its broader theme—the possible existence of a nationwide conspiracy to discredit local police officers—it is clear that the district court was correct in holding that there is significant public interest in the subject matter of the article. Discussion and debate about matters of this character merit the kind of First Amendment protection that the Supreme Court described in New York Times Co. v. Sullivan and later cases extending its rationale to include not only comment on public officials, but public figures and public issues as well. See Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 47–52, 91 S.Ct. 1811, 29 L.Ed.2d 296 (opinion of Mr. Justice Brennan).

It is less clear, however, that the false comments about the plaintiff are worthy of the same protection. It is one thing to omit the word "alleged" from an otherwise ac-

[8]With deliberation we have included the word "significant" in our statement of the question because we are convinced that areas of privacy remain beyond the coverage of the *New York Times'* protective shield. In our view mere public curiosity about private matters is not the kind of "public interest" that the standard contemplates. See Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 n. 12, 45 n. 13, 48, 91 S.Ct. 1811, 29 L.Ed.2d 296 (opinion of Mr. Justice Brennan).

curate comment on a newsworthy subject;[9] it is quite another to include a gratuitous and collateral remark about a participant in a public controversy. The omission, even if it makes the comment false, does not enlarge its subject matter beyond the area in which First Amendment protection is properly afforded. But the addition of an unnecessary and irrelevant comment about a private individual is not automatically protected simply because it is contained in an article dealing generally with an important subject. Otherwise a few introductory platitudes might be used as a justification for false and destructive invasions of the privacy of ordinary citizens. *Cf.* Kois v. Wisconsin, 408 U.S. 229, 92 S.Ct. 2245, 33 L.Ed.2d 312 (1972).

In this case, the alleged "Communist front" associations of the lawyer for the Nelson family were quite irrelevant to the question of Nuccio's guilt or innocence of the crime of murder. They were inserted in order to develop the thesis about a national conspiracy against the police. To the extent that these comments lent any support to that thesis, they were either false or unconvincing. Although more credible and respectable authors than Stang or Stanley have written on the same theme,[10] we may also assume that the article's basic thesis is false. Nevertheless, under the reasoning of New York Times Co. v. Sullivan, even a false statement of fact made in support of a false thesis is protected unless made with knowledge of its falsity or with reckless disregard of its truth or falsity. It would undermine the rule of that case to permit the actual

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[9]See Rosenbloom v. Metromedia, 403 U.S. 29, 55, 91 S.Ct. 1811, 29 L.Ed.2d 296 (opinion of Mr. Justice Brennan); Time, Inc. v. Pape, 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45.

[10]See, *e.g.*, Inbau, Behind Those "Police Brutality" Charges, a 1966 *Reader's Digest* article reproduced in the Supplemental Appendix at p. 117.

falsity of a statement to determine whether or not its publisher is entitled to the benefit of the rule.

If, therefore, we put to one side the false character of the article and treat it as though its contents were entirely true, it cannot be denied that the comments about plaintiff were integral to its central thesis. They must be tested under the *New York Times* standard.

III.

There is no evidence that Stanley actually knew that Stang's article was false; defendant did not "deliberately publish falsehoods." The question is whether the publication was made recklessly. The Supreme Court has made two propositions abundantly clear. Both, as well as a third consideration which we shall mention, support the district court's appraisal of the issue.

First, the mere fact that a publisher fails to verify the accuracy of defamatory statements in an article submitted by an author whom he could reasonably assume to be trustworthy is not sufficient to establish a reckless disregard for the truth. On several occasions the court has expressly stated that the record must reveal a "high degree of awareness of . . . probable falsity" before a publisher may be found to have acted recklessly.[11] In this case there

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[11]St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262; Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 84-85, 88 S.Ct. 197, 19 L.Ed.2d 248; Garrison v. Louisiana, 379 U.S. 64, 74-75, 85 S.Ct. 209, 13 L.Ed.2d 125. In his opinion in Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094, Mr. Justice Harlan stated the standard for plaintiffs who are not public figures as merely requiring ". . .a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by

is no evidence that Stanley knew anything at all about plaintiff except what was contained in Stang's article.

Second, the Court has plainly stated that the evidence establishing reckless disregard for the truth must be clear and convincing, and that an appellate court has an independent obligation to make its own analysis of the record before a finding that a comment was reckless may be approved.[12] Unquestionably, in a close case the policy of encouraging free and uninhibited expression is to be preferred over the conflicting policy of deterring irresponsible defamatory comment. Apart from the failure to verify Stang's facts, and an apparent disposition to assume that a lawyer who could file a civil rights case against a policeman may well be a "Communist fronter," there is no evidence that Stanley acted recklessly within the Supreme Court's definition of that term. To assume that Stanley must have known, on the basis of information received from Stang over the telephone or from some other source, that the comments about plaintiff were false, would itself

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responsible publishers." *Id.* at 155, 87 S.Ct. at 1991. However, in that case, the publisher had been notified prior to publication, both by the plaintiff and by his daughter, that the material about to be printed was false. *Id.* at 161 n. 23, 87 S.Ct. 1975. Moreover, as we read the subsequent opinions, although Justices Stewart and Marshall, and perhaps Justice White, may have adopted Mr. Justice Harlan's less severe standard (see Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 57-62, 91 S.Ct. 1811, 29 L.Ed.2d 296 (opinion of Mr. Justice White), 62-78, 91 S.Ct. 1811 (opinion of Mr. Justice Harlan), 78-87, 91 S.Ct. 1811 (opinion of Mr. Justice Marshall with whom Mr. Justice Stewart joined), at least the Chief Justice and Justices Douglas, Brennan and Blackmun have unequivocally rejected it. Thus, the majority of the present Justices who have spoken to the point would not relax the *New York Times* standard in a case not involving a public official.

[12]New York Times Co. v. Sullivan, 376 U.S. 254, 285-286; Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 55, 91 S.Ct. 1811, 29 L.Ed.2d 296 (opinion of Mr. Justice Brennan); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 83, 88 S.Ct. 197, 19 L.Ed.2d 248.

be reckless. Our examination of the record satisfies us that "'the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands. . . .' 376 U.S., at 285-286, 84 S.Ct 710." Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 83, 88 S.Ct. 197, 199, quoting from the *New York Times* case.[13]

Third, if the issue were doubtful, we would defer to the conclusion of the trial judge. Having heard the testimony and observed Stanley on the witness stand, and even though he expressed understandable concern about the wisdom of the rule he felt obligated to apply, he concluded unequivocally that the evidence did not meet the New York Times Co. v. Sullivan standard.[14]

Finally, by reference to matters not in evidence, plaintiff in effect asks us to take judicial notice of a reckless disregard for the truth on the part of the John

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[13]One distinction which is lost in some of plaintiff's arguments should be kept in mind. "[I]ll will toward plaintiff or bad motives, are not elements of the *New York Times* standard." Rosenbloom v. Metromedia, 403 U.S. 29, 52 n. 18, 91 S.Ct. 1811, 1824, 29 L.Ed.2d 296 (opinion of Mr. Justice Brennan). Thus, the kind of malice which will, for example, defeat a conditional privilege in the traditional tort law of libel, will not satisfy the *New York Times* standard. However bad its motives, a publisher is protected by the First Amendment as long as the allegedly libelous statements were not made with knowledge of falsity or with reckless disregard of whether they were true or false.

[14]"THE COURT:I can say now, without any question and it will appear of record in the case, that on the basis of the evidence that I have heard, that if I—if I should hold, or some other court should hold, that he is a public figure, that so far as the rest of the evidence is concerned, I would direct a verdict on the question of malice, on the evidence that I have heard. I wouldn't even submit it to the jury." S.A. 88.

Birch Society and its affiliates.[15] Unquestionably, a judge's sympathetic reaction to the point of view expressed

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[15]Plaintiff makes three arguments that were not pressed below. (1) He contends that the recklessness is established by the fact that representatives of the John Birch Society have previously referred to great Americans, such as President Eisenhower, as "Communists," and that certain of its procedures contemplate the deliberate use of propaganda that may well be inaccurate. This contention is unsupported by any evidence in the record. Plaintiff does argue that he was prevented from introducing all of his evidence on actual malice because the trial court had previously ruled—contrary to its reassessment of the situation at the time of the motion for judgment n.o.v.—that the *New York Times* standard did not apply. However, plaintiff did present evidence of malice (both the "constitutional" and the "ill will" type) to support his damage claim and no such evidence was excluded; at least he points to no occasion when he made an offer of proof of relevant evidence which was refused. Even if the references to President Eisenhower had been offered, such evidence would not meet the *New York Times* standard. Plaintiff does not contend that Stanley knew him or anything about him when the article from Stang was received. At most the "Eisenhower" evidence tends to prove that Stanley would be less disposed than another editor to question the author's characterization of plaintiff. (2) He contends that continued distribution of the April edition of *American Opinion* after this litigation was commenced establishes defendant's recklessness; however, defendant offered evidence for the purpose of proving a good faith post-complaint attempt to verify the charges, and plaintiff persuaded the court to exclude such evidence on the ground that ". . . anything that was done after the publication of the article [is] entirely irrelevant to these proceedings." S.A. 104. (3) Plaintiff seems to contend, on appeal, though he never so argued at trial, that since Stang was described as a "contributing editor" in later issues of the magazine, though not in the April 1969 issue, that defendant should be held liable on a *respondeat superior* doctrine for the malice of Stang. We do not find the later "contributing editor" characterization, in itself, sufficient to change the free-lance character of Stang's relationship with defendant. No other evidence of an employer-employee relationship was proffered. Thus, we also find no error in the trial court's refusal to order defendant to produce Stang for examination as an adverse witness.

in an article which has been found to contain libelous matter may make it easier for him to afford a publisher First Amendment protection.[16]

We cannot, however, apply a fundamental protection in one fashion to the New York Times and Time Magazine and in another way to the John Birch Society.[17] Whether we are moved to applaud or to despise what is said, our duty to defend the right to speak remains the same.

The judgment is affirmed.

KILEY, Circuit Judge (concurring).

I concur. Judge Stevens has written a persuasive opinion. It is with considerable reluctance, however, that I concur. The reluctance is due to my fear that we may have in this opinion pushed through what I consider the outer limits of the First Amendment protection against liability for libelous statements and have further eroded the interest of non-"public figures" in their personal privacy.

Gertz, a reputable attorney, is virtually called a Communist in an article written by Stang and adopted by Stanley without the latter making any inquiry on his own as to whether there was a reasonable basis for calling Gertz a Communist.

This is not the *Rosenbloom* case, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971). Rosenbloom was the publisher of "nudist magazines," and the news broadcast by defendant implicitly referred to Rosenbloom as a "smut

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[16]See Kalven, The New York Times Case; a Note on "the Central Meaning of the First Amendment," 1964 Sup.Ct.Rev. 191, 200.

[17]See Police Department of the City of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972).

distributor" and a "girly-peddler." The involvement of the non-"public figure" with an issue of public interest is a consideration which moved the Supreme Court to apply the *New York Times* rule in *Rosenbloom*. I cannot find that Gertz was closely involved with the asserted national Communist conspiracy, as Rosenbloom was with the "smut literature racket."

Yet Judge Stevens shows that the trend of the Supreme Court decisions requires "in this close case" the conclusion that the district court did not err in entering the judgment for defendant, notwithstanding the verdict for Gertz.

APPENDIX F

FRAME-UP
Richard Nuccio And The War On Police

(Reprinted from *American Opinion*, April, 1969)

Alan Stang is a former business editor for Prentice-Hall, Inc., and a television writer, producer, and consultant. Mr. Stang is a frequent contributor to AMERICAN OPINION *and is author of the Western Islands best-sellers,* It's Very Simple *and* The Actor. *Alan Stang has just returned from an investigative trip to Chicago, where he conducted extensive research into the Richard Nuccio Case.*

ON THE night of June 4, 1968, Mr. Benjamin Citron who owns Franksville, next to Wrigley Field in Chicago, saw Mr. Ronald Nelson a few feet away through the window, sitting at the table just outside the glass. Citron knew Nelson well. He was a regular at the restaurant, and a leader of a gang of toughs who liked to draw obscene pictures on the tables. They had first met about two years before, when Nelson and an accomplice used Franksville's washroom to store a cache of marijuana and pep pills, which Citron reported to police before Nelson could reclaim it.

Some time later, Nelson returned to Franksville under the influence of drugs, greeted Citron as follows: "You lousy Jew"; hit Citron and knocked off his glasses. This is probably the place to mention that the hoodlum named Nelson was at the time a "youngster" of seventeen, and Citron a man in his middle fifties.

In Boys Court, Judge Saul Epton persuaded Mr. Citron to withdraw his charges, in exchange for which he ordered

Nelson to stay away from Franksville. But the young hood didn't stay away. When Mr. Citron had seen him there, he had reminded Nelson of the Judge's order. And Mrs. Citron had called his mother, who said she couldn't "do a thing with him." So it went, society excusing Ronald Nelson on the modern theory that crimes are caused not by criminals but by punishment; that you are to blame when your car is stolen. You see Nelson's arrest record – part of it – reproduced on page four.

So Ronald Nelson's mere presence at Franksville on the night of June 4, 1968, was a violation of an order issued by a Judge. And when Citron saw him he was afraid; not just because Nelson was so obviously drunk, but because he was staring at Citron from a few feet away through the window – playing all the while with a *knife.*

As he had so many times, Ben Citron called the police.

At about 9:40, a marked police car arrived with uniformed officers Ronald Rothmund and Richard Nuccio; and then an unmarked car with Plainsclothesmen Kenneth Hyatt and Joseph Sand. Nuccio also knew Nelson as well. On June 11, 1967, for instance, a year earlier, Nelson had not only been at Franksville again – in violation of Judge Epton's order – but was one of a group throwing stones at the premises, a favorite pastime. When Officer Nuccio, who happened to be eating there, went to the aid of another Officer who tried to quiet them, Nelson and the others had attacked Nuccio using a board as a club – and sent him to the hospital for X-rays and treatment. Nelson and the others had been arrested of course, but were released at the station by Captain John Lennon, because they had been giving the police information about burglaries – information it is easy to believe they had.

On the night of June 4, 1968, Officer Rothmund was the first man to reach Nelson and saw the hoodlum with the knife. And as he had so many times when the police arrived because of his presence, Nelson ran, this time into an alley behind Franksville. Rothmund shouted to his fellow Officers to stop him, loudly warning that Nelson had a knife. Officer Nuccio, followed closely by Hyatt, pursued the hoodlum into the alley, trailing by twenty or twenty-five feet.

Nelson slowed, cocked him arm and turned slightly to the right.

"Look out!" yelled Hyatt, "he's going to throw the knife!"

Hyatt dove for cover. Nelson threw the knife at Officer Nuccio. The Officer drew his revolver, went to one knee and fired. The knife shot over Nuccio's head, and was retrieved by Officer Hyatt.

Nelson died in a hospital a few minutes later. His body was found to contain 71 mg. percent of ethanol. Indeed, in the coroner's report on the death of this nineteen-year-old, we read that the "significant conditions contributing to death" were not only Nuccio's bullet, but a case of "acute alcoholism."

You will see reproduced, on page seven, one of the twenty-six Honorable Mentions won by Officer Nuccio for his fearless police work since his appointment to the force in December, 1966 — an average of better than one per month.

This time, Nuccio received no Honorable Mention. No, instead he has been convicted of murder and sentenced to at least fourteen years in prison.

I.

IT seems that the friends of the young alcoholic and hoodlum followed him to the hospital, where they made a disturbance which required the police. On the next day, Mr. Citron of Franksville was threatened by telephone and had to be given police protection. That night, some "youngsters" were arrested at his restaurant with a sign which threatened: "Die, Nuccio, die, Nuccio. If the courts don't get you, we will." They picketed Officer Nuccio's house, yelling "Killer." And such friends of Nelson's as Noel Kitchen, John Ahrens, George Bish, and Trena Ciabay began holding private meetings, at the home of Judy Rankin, for instance, on Belle Plaine, where they got some expert public relations and legal assistance, resulting, for example, in a leaflet headed: "We don't like the Nelson killing."

On July eleventh, this young gang appeared in force at a regular board meeting of the Lake View Citizens' Council, a local organization whose members have varying political views. And with the assistance of Gene De Roin, Chairman of L.V.C.C.'s Human Relations Committee, and its second Vice President, Reverend Carl Lezak of St. Sebastian's School where the meeting was held, they engineered an L.V.C.C. endorsement of a resolution calling for Officer Nuccio's suspension — and another calling for an L.V.C.C. public hearing about the police in general and Nuccio in particular.

Nelson's friend Bish is intensely interested in the police. A few days later, he was arrested as one of a gang which sent another Police Officer, M.A. Rosenthal, to the hospital with serious injuries.

On July twenty-second, the public hearing was held at the Lake View Presbyterian Church — two days before the

inquest. Voices in the audience called for Nuccio's arrest, for disarming the police, and for a civilian review board – one-third of whose members would represent "youth," and which would have the power to suspend and fire policemen. John P. Fahey, Commander of the Town Hall Nineteenth Police District, and Officer Nuccio's boss, told the crowd: "Right or wrong, you obey a policeman" – which Gene De Roin later told me was "irrational," and the wrong way to communicate with the "youth." Many in the crowd jeered the Commander. Some stood and yelled "Sieg heil!"

[photo]

Officer Richard Nuccio, shown here with one of his three children, was framed for murder.

Revolutionary agitators were now hard at work to "Get Richard Nuccio."

As one of the teenagers' attorneys put it, according to the *Chicago Seed:* "No one is bound by the findings of a Coroner's Inquest. However, it is up to the community to exert whatever power it can on the existing investigating bodies, preferably before the 24th."

The *Seed* is an "underground," Marxist, revolutionary newspaper which pushes drugs and of course degeneracy. It naturally opposes our local police and came out strongly against Officer Nuccio. So did the September, 1968, issue of the *Movement*, which calls policemen "pigs" and says it is affiliated with the Communist Student Nonviolent Coordinating Committee and the terrorist Students for a Democratic Society:

> About twenty people were at the hot dog stand the night Richard Nuccio, cop, shot Ron Nelson, 19, in the back, coldly, deliberately, from about 60 feet, on June 4, in Chicago. Ron was running down an alley, running because he had been harassed by Nuccio before and was afraid of what could happen that night. The owner of the stand had called the police because he hates the kids and wanted to get them off his place. No fight, no looting, no disturbance, nothing had provoked the shooting.

Yes, the Comrades now had the line: Get Richard Nuccio!

Then there was the Lake View Youth Council, which speaks in a flyer of a "police-youth communication breakdown," and of the feeling of "the youth" that the Nineteenth District police have "declared war on them and that's exactly what it is, a war caused by lack of compassion, sensitivity and understanding. A committee of the Youth Council is probing deeper into the matter."

We read that the purpose of the Youth Council is to organize the youth. It will offer its members legal aid. And the flyer paraphrased the Communist Black Panthers: "The major theory behind the youth council is 'youth power.'. . ."

Also circulating in the neighborhood at the time was a *Community Newsletter,* written and published by "concerned adults," who speak of an "undeclared war between the police and the teen-agers," and call for a civilian police review board – which is a standard Communist ploy.

[photo]

Part of the arrest record of hoodlum Nelson.

"A child has been killed!" writes Les Paul in this incendiary sheet. "The killer, a cop, roamed the street, still in good standing, until the city acted to over-rule the commander of *our* district. *Our* district police see no need to be responsible to the people! *Our* district people see youth as their enemy! *Our* district police feel free to harass, to threaten, to brutalize anyone they don't like, and *our* district police find most of us they don't like – especially kids."

Indeed, says Mr. Paul: "A community that attacks its own childen is sick; those who carry out these attacks are no better than mad dogs. . . . "

Get it: The police are "mad dogs."

And there is a college student named Carol Whiting, who wrote as follows of the matter some time later in a revolutionary "Wallpaper". "The youth in Lakeview have taken a step in the right direction. It's only a beginning, though. The time has come when youth all across the country – in school and out – must start demanding – not asking for – what's rightfully theirs. We can no longer sit back and ask for favors. We must demand equal rights and be willing to fight for them whether it be in the courts or in the streets."

Elsewhere in the same "Wallpaper," we read: "LeRoi Jones tells the Man: Up Against the Wall, Mother f****r: This is a Stick-up!

"Who are we sticking up? That's important to know.

Sure we have to fight the pigs when they attack and when they protect the city for the people. But the pigs only carry out orders (though often as brutally as possible). * * * The cops don't run the show; they're not the main enemy. We must move the fight on from anti-pig to anti-imperialist pig."

The article urges readers to call the terrorist Students for a Democratic Society.

In short, the Nelson incident was used by revolutionaries of the Far Left to try to turn the people against the police – and vice versa – at a time when criminals with official sanction are tearing our country apart.

II

BY now you are thinking that there is more to this matter than some teenagers hanging around a hot dog stand. Teenagers at a hot dog stand would not know how to arrange the carefully orchestrated publicity the case soon acquired. And of course you are correct. They wouldn't.

But Elmer Gertz for instance would. On behalf of the Nelson family, attorney Gertz has filed three suits against Officer Nuccio and the City of Chicago, two in state court and one under the Federal Civil Rights Act, asking for a total of almost a million dollars.

The file on Elmer Gertz in Chicago Police Intelligence takes a big, Irish cop to lift. According to the Communist *Worker* of December 8, 1964, he has signed a petition to abolish the House Committee on Un-American Activities. On May 12, 1966, he sponsored another such petition, published by the Illinois division of the American Civil Liberties Union – founded by Harry F. Ward, one of the top Communists in the United States. Gertz also was a pallbearer for Jack Ruby, the "lone fanatic" who killed the

"lone fanatic" who killed the President of the United States. He has been an official of the Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government.

On April 27, 1968, the Chicago Peace Council conducted a "peace parade," as part of an operation coordinated around the country by the National Mobilization Committee to End the War in Vietnam, a Communist outfit headed by Communist David Dellinger – which also coordinated the terrorist attack on the police at the Democrat Convention in August. The Chicago Peace Council is also a Communist outfit. It is headed by a Communist named Jack Spiegel. Its headquarters are at 1608 W. Madison in a building owned by Communist John Rossen, an official of the defunct Communist Fair Play for Cuba Committee. Also headquartered in the building is the Communist S.D.S. Indeed, the Chicago Peace Council chose a former National Secretary of S.D.S. named C. Clark Kissinger to organize its Communist parade last April twenty-seventh. Kissinger, too, was later active in the terrorism against the police at the Chicago Convention.

The Communist parade in April included the usual Communist violence. Apparently, the traitors were practicing for what they planned to do in August. And just as the phony Walker Commission and its *Walker Report* followed the terrorism in August, so a commission and a report called *Dissent and Disorder* followed the terrorism in April, financed by the Roger Baldwin Foundation of Communist Harry Ward's A.C.L.U. After an "impartial investigation," the A.C.L.U.'s Commission ridiculed "the inaccurate impression that the April 27 event was a left-wing affair"; exonerated the Communist Chicago Peace

Council, which ran it; and naturally blamed the violence the Communists caused on the Chicago police: "On April 27, at the peace parade of the Chicago Peace Council, the police badly mishandled their task. Brutalizing demonstrators without provocation, they failed to live up to that difficult professionalism which we demand."

[photo]

Ronald Nelson, shot as he attacked with knife.

And the Chief Counsel for the Commission which committed *Dissent And Disorder* was the same Elmer Gertz who now turns up as lawyer for the Nelsons in the attack on Officer Nuccio.

In fact, the only thing Chicagoans need to know about Gertz is that he is one of the original officers, and has been Vice President, of the Communist National Lawyers Guild — which has been described by the House Committee on Un-American Activities as "one of the foremost legal bulwarks of the Communist Party" — and which probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democrat Convention.

Yes, Gertz is good at publicizing "police brutality." On July twenty-fourth, two days after the "open hearing" at the Lake View Presbyterian Church, he was active at the inquest, which had the flavor of a trial.

Five days later, Richard Nuccio was indicted for murder.

III.

At the trial, suddenly, none of the State's witnesses remembered seeing Nelson with a knife. Nobody heard Officer Rothmund warn Officer Nuccio he had one. Nobody heard Plainclothesman Hyatt warn Officer Nuccio the hoodlum was going to throw it. Instead they had decided to say they saw Nuccio fire, while standing erect — and do so when Nelson was already eighty or ninety feet away. They claimed that Officer Nuccio had kicked Nelson as he lay on the ground; that on earlier occasions he had tried to provoke the kindly Nelson by saying he had made love to his girl; had forcibly driven the gentle Nelson long distances in police cars and made him walk home; had called the pure and virtuous girls at Franksville whores; had threatened various teenagers with gun and blackjack.

One of the prosecution's witnesses had never made a statement until July seventeenth — *six weeks after the shooting*. Another was Trena Ciabay, who as you will recall had met with the others at the home of Judy Rankin, where some of the planning had been made. Another "witness" was Linda Scheel, who was one of those arrested on the night after the shooting, with the sign which threatened Officer Nuccio with death. There was John Ahrens,* who also had met with the others at the Rankins', had been convicted of possession of marijuana in 1966 — and who, on June 11, 1967, was one of those arrested for attacking Nuccio with a board, sending him to the hospital. There was Noel Kitchen, who also had participated in the planning, had threatened Nuccio in July,

*Other teenagers have told police officers in the neighborhood that William Clements, of the *Chicago Daily News*, paid Ahrens forty dollars a day to find other prosecution witnesses. I called Mr. Clements and he said it was "absolutely untrue."

1967, and once was arrested along with Ahrens, who was arrested for possession of marijuana. On the night of June 4, 1968, Kitchen heard nobody yell anything about a knife. On the contrary: "I thought I heard someone yell 'Shoot him.'"

And there is Steve Austill, the State's *star* witness, who was with Nelson at Franksville that fatal night. It was Austill who told the Court for instance that Officer Nuccio had kicked the wounded Nelson. He also admitted having committed shoplifting and car theft. On February 23, 1967, he was given a year's probation for possession of marijuana. On October 26, 1967, he drew another year's probation for petty theft. Indeed, on September 5, 1968 — exactly one week after Officer Nuccio's trial — "star witness" Austill was arrested again on a dangerous drug charge. In fact, on December 16, 1968, he was arrested yet again, this time for burglary, and released on $3,000 bail. Also arrested on that occasion was community pillar George Bish, who had fought so hard for justice for his late friend, Ronald Nelson.

You will remember that Mr. Citron first met Nelson when he and a friend left some marijuana and pep pills in Citron's washroom. Austill was the friend. He was also one of those arrested on June 11, 1967, for throwing stones at Franksville and sending Officer Nuccio to the hospital. Austill is a specialist at throwing stones. He had thrown them many times at Mr. Citron and his restaurant. He was throwing them again on June 4, 1968. That was why he had been arrested several times for disorderly conduct and, like Nelson, told by Judge Epton to stay away.

So on the night of the shooting, not only was Austill's presence at Franksville, like Nelson's, a violation of a Judge's order — resulting in his arrest for criminal trespass — but he was already on probation for a previous offense.

[photograph]

But one of Patrolman Nuccio's 26 citations.

In fact, on that night this "witness" was already a fugitive, wanted by the police for jumping bond in another case, and a warrant was outstanding for his arrest.

I realize all this is hard to believe. I'm sorry about that. I'm trying to tell it as baldly as possible to avoid making it even harder.

So now, members of the jury, you have an idea of the credibility of the witnesses. But that of course proves nothing about the incident itself. Hopheads, after all, have moments of lucidity. Maybe the witnesses are telling the truth. So let's hold in abeyance what we have just discussed. Let's forget that these are "oppressed teenagers." Let's treat them like the responsible individuals they say they are, and look strictly at their testimony.

There is for instance a gentleman named Stephen P. Austill, the State's star witness. In July, 1967, Nelson was arrested, and Austill says he went to the police station to get him help, offering in exchange to give information on narcotics to Officer Kenneth South:

Q. Did you have such information available to give Officer South at the time you made the offer?

A. No, sir.

Q. Was that, then, a false promise to him?

A. Yes, sir.

Q. You lied to a police officer to help your b u d d y ?

A. Yes, sir.

Q. So are you lying now on the witness stand for your own purposes?

A. No, sir.

He says he lied to the law before, but is telling the truth now. Does that produce in your mind more than a reasonable doubt? Doesn't it establish the State's *star* witness as an admitted liar?

Then there is Mr. Jose Rodriguez, who said he is a student at Wright Junior College, but under cross-examination said he hadn't started yet:

Q. Was Nuccio in an unmarked car?

A. Yes.

Q. Was Nuccio in uniform?

A. Yes.

Q. He was in uniform in an unmarked car?

A. Yes.

* * *

Q. What was the color of Nuccio's unmarked car, again, please?

A. Brown.

Officer Nuccio of course was in a *marked* car that night. But, as your attorney will tell you, there will often be discrepancies in testimony about tangential details even when witnesses are telling the truth, simply because no two people remember everything alike. So let's simply confine ourselves to the issues on which the State based its case.

Here, for instance, is how Mr. Rodriguez handles the crucial question of how far Nuccio was from Nelson:

Q. Did you ever say to anybody at any time that when Nuccio fired the shot he was 50 feet away from Nelson, did you ever say that?

A. Yes, sir.

Q. And that is different from your testimony now, that he was 80 feet. Is that correct?

A. Yes, sir.

Rodriguez does not explain the additional feet. He simply agrees that, yes, they are additional.

Then there is Edward Ryan, who in a deposition said he was five or ten feet from Nuccio when he fired; at the trial said he was fifty or sixty feet away; then that he was twenty feet away:

Q. Tell us again how far you were away from Nuccio when Nuccio fired the shot in terms of feet?

A. About a rough 20 feet behind him.

Q. You were now 20 feet behind him?

A. That's right.

Ryan also says that Nelson was ninety feet from Nuccio when shot. Remember that the distance between them is crucial to the question of whether Nuccio was in any danger:

Q. And when Mr. Tully [a prosecutor] was asking you questions on July 18, 1968, did you tell Mr. Tully that Nelson was about 40 feet and not 70 or 80 from Nuccio when Nuccio fired the shot, did you tell him that?

A. Yes.

He explains that he returned to Franksville two weeks before the trial and found the distance was seventy or eighty feet. He doesn't say whether he had any help in making this convenient determination.

Closely related to the distance between them is the question of whether Nuccio followed Nelson into the alley. Nuccio and Hyatt say he did, at a distance of twenty or twenty-five feet. But the State's witnesses say he didn't and was far behind. For instance, there is a female named Mary Falagario, who says Nuccio was ten feet north of a light pole at the entrance to the alley when he fired:

Q. Do you know how wide the east-west alley is?

A. No.

Q. You know the alley is about eight feet wide?

A. No.

Q. And that if Nuccio was ten feet to the north of the alley pole, he would be north of the alley and couldn't shoot into the east-west alley? Do you know that?

Then there is a female named Jessica Genaro, who says also that Nuccio was north of the pole when he fired.

Q. How far north of the pole?

A. Well, he was about 10 or 15 feet from the pole.

Q. Well, was he 10 or 15 feet north of the pole?

A. Northeast of the pole.

Q. Northeast of the pole?

A. Yes.

Remember that these are the State's own witnesses. And according to Miss Genaro it was even less possible for Nuccio to fire into the alley. She, too, says she attended one of those meetings about the matter.

And there is Miss Edna Rosario:

Q. And he was a little to the north? Or was he to the south of the light pole?

A. No. He was north.

Q. He was north?

A. Yes.

Q. How many feet north of the light pole was he?

A. Around 20.

Q. About 20 feet.

A. Yes.

So according to Miss Rosario, it was *doubly* impossible for Nuccio to fire into the alley. Something is mighty strange here, isn't it?

Then there is the question of whether Nelson had a knife. None of the State's witnesses saw anything, of course, but on June 24, 1968, Mary Falagario signed a Statement for the police in which she said, "I can't be sure" Nelson didn't have a knife. At the trial, however, she says she saw nothing in his hands.

Curious.

And there is the question of how Officer Nuccio actually fired. The Officer says he fired from one knee as part of

a reflective action to avoid the knife. The State says he took careful aim and fired erect. But State's witness Leonard Noe testifies as follows:

> *Q. Did you ever say that when you saw Nuccio fire the gun that he went down almost to one knee? Did you ever say that? Did you ever say that?*
>
> *A. Yes, I imagine I did.*
>
> *Q. Well, you know you did, don't you?*
>
> *A. Yes, I did.*

Police officer after police officer, after Ben Citron, said Noe was right; that Nelson had a knife and threw it; that Nuccio had been warned about it; that he fired from only twenty or twenty-five feet. The knife was duly presented in evidence. And as we have seen, defense attorney Julius Lucius Echeles destroyed the State's case with a thoroughness reminiscent of the Dresden firebombing. But he made one mistake. He waived a jury trial in favor of a bench hearing before Judge Richard J. Fitzgerald. And, incredible as it sounds, Judge Fitzgerald bought the State's case.

[Photograph]

Elmer Gertz of Red Guild harasses Nuccio.

He bought it all.

He agreed, for instance, that Nelson was seventy to ninety feet away when Nuccio fired. "And it would be il-

logical, therefore, to assume that the deceased could have in any manner caused the officer great bodily harm . . . ."

Let us assume for the moment that Nelson was as far away as anyone has claimed: ninety feet. Are we also to assume that one is in no danger from a knife thrown that far? Would those who say yes be willing to test their answer? Remember that the target of such a knife has no time to pull out a tape measure to satisfy a judge. And observe that Judge Fitzgerald doesn't say he disbelieves that Nelson had a knife – just that at a distance of seventy to ninety feet Nelson couldn't have done enough damage.

On Thursday, August 29, 1968, Judge Fitzgerald found Police Officer Nuccio guilty of murder – only a few hours after hordes of Communists and young toughs and dupes attacked his fellow officers the evening before, a short walk away at the Conrad Hilton. If, like millions of other Americans, Judge Fitzgerald was watching television on the evening of Wednesday, August twenty-eighth, he saw not those Communist attacks, but just the Chicago police responding to the attacks, which created the impression of an unprovoked "police riot," as the *Walker Report* put it. He heard such humanitarians as Walter Cronkite expressing indignation. Like millions of other Americans, he was watching an organized attempt to discredit our local police – organized primarily by the Communist National Lawyers Guild, preeminent in which is the same Elmer Gertz who now appears as the Nelsons' lawyer.

"There is something within the human soul which cries out against sacrificing a 19-year-old on the altar of deterrence," he said in his verdict, a few hours later in court.

He called his decision "the most difficult I have ever had to make." Some weeks later, he sentenced Richard Nuccio

to fourteen to fifteen years in prison – the minimum sentence. He has permitted Nuccio – a convicted murderer – to live at home while his appeal is being filed.

Could it be that Judge Fitzgerald's conscience is bothering him?

IV

PARTICULARLY amazing in this matter is the behavior of the Office of the State's Attorney, in particular that of Assistant State's Attorneys Thomas M. Tully and Matthew P. Walsh, who collaborated to prosecute Officer Richard Nuccio. You will remember that on the night of June 4, 1968, *star witness* Stephen Austill was arrested for criminal trespass. The State's Attorney's Office has since tried to avoid prosecuting him, because he was so helpful in the Nuccio case. You will also recall that, soon after the shooting, community pillar George Bish and some others were arrested for sending another police officer to the hospital. The State's Attorney's office apparently wanted to "nolly" that one, too. Indeed, several police officers tell me this is standard operating procedure, and ask with puzzled bitterness whether it pays to make any more arrests.

On the fatal night of June fourth, as you will also remember, Officer Ronald Rothmund saw Nelson, armed with a knife, escaping the scene. You would think, wouldn't you, that Rothmund had vital testimony to give in the case. But Tully and Walsh, trying for an indictment, did not summon him to the Grand Jury to give it:

> *Q. Were you called by the State's Attorney to testify before the Grand Jury in this case?*

A. No, sir, I was not.

Q. Did Mr. Tully, the Assistant State's Attorney here, know your name?

A. Yes, sir, I believe he did. It was on all the records from the inquest and prior to that.

And you will remember that Officer Kenneth Hyatt also saw the knife. It was Hyatt who warned Nuccio that Nelson was going to throw it. You would think, wouldn't you, that Hyatt also had vital testimony to give. But Tully and Walsh didn't call him either:

Q. On the day that you spoke with Mr. Tully at the scene of the Franksville area, did you tell Tully that you saw a knife on Nelson and saw Nelson throw a knife? Did you tell him that?

A. Yes, sir, I did.

* * *

Q. Were you subpoenaed by anybody to appear before the Grand Jury that returned an indictment in this case?

A. No, sir.

Your attorney will also tell you that the function of a prosecutor in the United States – isn't simply to prosecute. It isn't just to lock people up. For that we wouldn't need an American prosecutor. We would need a Gestapo or a K.G.B. and a theatrical director, who could stage one of those Nazi or Communist show trials. In our country, on the contrary, a prosecutor is supposed to develop *evidence* – even if the evidence frees an accused – because his purpose isn't basically to prosecute, but to *protect the innocent.*

But Tully and Walsh apparently did some staging of their own. They denied the Grand Jury the Testimony which would have thrown the case out of court.

Since the charge was murder, which after all requires some premeditation, Walsh told Judge Fitzgerald at the trial that Nuccio "used the gun that he was given as a police officer to carry out a crime that he possibly had planned, he certainly instituted and completed, on the 4th of June, 1968."

But, first, Officer Nuccio of course didn't know he was going to Franksville that night, until he heard the call on his radio a few minutes before his arrival. He didn't know who would be there. He didn't know what he would find. He didn't even see Nelson until he came running around the building a few seconds before the shooting – which is how much time Nuccio had to "premeditate." And, second, if you really are premeditating to murder someone, would you really premeditate to do it before a swarm of your victim's friends? Does that make sense?

And finally there is the fact that on the evening of the morning Mr. Citron testified, Walsh appeared at Franksville, denounced his testimony, and tried to intimidate him – which if not unlawful itself is at least highly unethical – to such an extent that Citron ordered him off the property.

"Do you realize the penalty for perjury in this state?" said Walsh.

And that sounds to me like some sort of "brutality." Wouldn't you agree?

Indeed, only a short time later, Walsh's partner, Assistant State's Attorney Tully, was accused of intimidating another witness, in another case – "I told him that if he

told a falsehood in court, under oath, he could be liable for perjury and could be convicted" – but has been exonerated by the Judge for lack of evidence.

The Judge was the same Richard J. Fitzgerald who convicted Nuccio.

By this time, of course, you are asking yourselves why Tully and Walsh would behave so incredibly. You are wondering whether there could be any other reason than a desire to make grisly reputations.

We don't yet know the whole story – we shall – but apparently there could be such a reason.

V

WHEN I went to Chicago to investigate this case for AMERICAN OPINION, I naturally did not know what I would find. Some people were saying Nuccio had been railroaded. But he had been given his trial and convicted. And policemen are human, like everyone else. Like judges and prosecutors, they sometimes go wrong. So I thought that maybe I would find nothing amiss. Maybe the complainers were simply complainers. Maybe Nuccio deserved what he got. You will remember that the first public meeting which led to Nuccio's conviction was held at the Reverend Carl Lezak's St. Sebastian's School, and that Lezak took an active part. I had heard that Lezak believed Nuccio was guilty, so I called on him to see whether he could persuade me to agree.

The Reverend gave me a very cordial hour. Like the excerpts of revolutionary literature you have heard in this article, he explained that the Nuccio case is symptomatic of the growing "polarization" of our society – in other words, that the teenagers and the police, for instance, are

at opposite poles. Indeed, Commander Fahey of the Nineteenth Police District will be interested to learn that Father Lezak says he has kids in his school who are thinking of blowing up the police station, and that one of them says he will become a human torch to do it.

Father Lezak said he "feels sorry" for Nuccio – because he is a murderer – but that most people in Lake View take Nuccio's side, which Father Lezak deplores. He also said the country in general supports the Chicago police, which he also deplores. People don't know the facts. For instance, he said, a hippy or even somebody with a long haircut, gets rough police treatment in the neighborhood. And he said he had been at Lincoln Park during the Convention riots to "counsel the youth," and saw horrible "police brutality," which he said the *Walker Report* proves.

I said I was glad to hear he had actually read the *Report*, because I had read it too, so we both knew it contained statement after statement by the revolutionary leaders that they were specifically coming to Chicago to attack the police.

He answered that he had always been for equal rights for all people. He criticized his congregation, many members of which he said pay their buck or so on Sundays but don't like his sermons on bad housing and civil rights. Maybe they didn't tell him at the seminary that people don't go to church to hear about bad housing.

He said he and a Reverend Bruce Young had recently gone to a meeting in Gary, "and got the word: it's coming."

"What's coming?"

"A Rightwing, Fascist takeover."

That's what he said.

He deplored the fact that the country is moving to the Right. He said he himself is a marked man – marked by the police. For instance, he was physically afraid to go to the Nuccio trial – afraid of the police. Indeed, he said, he is on the subversive list of the Chicago police. I asked him why in the world that would be so. He answered that he didn't know, but that he had always been for equal rights for all people. He came out strongly against "simplistic solutions."

"Are you a Communist?" I asked.

"Certainly not!" he said. "Communists are atheists and I'm a Roman Catholic priest."

He was wearing a yellow sport shirt, but I believed him. Since he said he isn't a Communist, I naturally believed that, too.

"Are you associated with the Chicago Peace Council?" I asked suddenly.

His eyes narrowed warily, which doesn't prove anything, of course. But, you see, I already knew that one of the reasons he could be on the subversive list is the fact that he has contributed money to the Chicago Peace Council. The C.P.C., as you will recall, is the Communist outfit headed by a Communist and defended by Leninist Elmer Gertz, who now turns up as lawyer for the Nelsons.

"I think I'm on the mailing list," he said.

Interesting, isn't it? Gives you a tingly feeling all over.

[photo]

Shown here is the knife which hoodlum Ronald Nelson used in attack on Officer Nuccio.

I told Father Lezak that, frankly, another Roman Catholic priest had told me that children coming home from St. Sebastian's Schoo! report that Lezak teaches as follows: "I see nothing wrong with Communism." Indeed: "I sympathize with Communism."

"Another priest told you that?"

"Yes."

"It isn't true."

But, you see, the other priest also told me that one of the victimized parents recently stopped in his office with the announcement that he was on his way to St. Sebastian's to kick Hell out of Lezak, and it was only after much soothing that the other priest was able to change the man's mind and let him out of his office. Had he failed, Lezak would have known how to take it. In February, 1968, he claims to have been beaten in a "civil rights" march at Mt. Greenwood School.

And finally Father Lezak told me – get ready – that as chance would have it, *one of his old friends and schoolmates is a prosecutor in the Nuccio case.*

Why would he tell me this? I don't know. Maybe so that when I found it out, myself, I would be less dumbfounded than you are now. He told me carefully that his friend had snubbed him in the courthouse corridor during the trial, which he said was another example of "polarization" – and which certainly puts both of them in the clear, doesn't it? When he saw I hadn't known about the relationship, he refused to say another thing about it, and would not say which of the prosecutors it is: Tully or Walsh. At this writing, we still don't know, but, as I say, we shall.

Handy, don't you think? Brings all sorts of questions to the mind. Wouldn't you, too, like to have a prosecutor

stashed away – just in case you were burning like Hell to have somebody prosecuted?

The second public meeting, which caused Nuccio's conviction, the one at which Commander Fahey was treated like a Nazi, was held as you will recall at the Lake View Presbyterian Church. So I went to see that church's Reverend Thurston Barnett. In the room when I arrived was the Reverend Bruce Young, a neatly bearded gentleman who like the Sphinx spoke not at all, but studied me through slitted eyes just like in the movies. This was the same man who went with Father Lezak to Gary, where the Father assured me they were warned of the coming "Rightwing, Fascist takeover." He questioned me closely about my credentials – yes, he did say something – and when I expressed surprise, explained along with Barnett that police spies have been nosing among their friends for information, and are in the habit of giving false names.

Then the Reverend Young studied me some more, deftly cataloguing every gesture and intonation, and the Reverend Barnett himself took over. He spoke with contempt of his mother-in-law, one of these types who believe that the assassination of Martin Luther King was conceivably part of a Chinese Communist plot to worsen racial conflict in our country. This made me feel at home. My mother-in-law, also a Presbyterian, also believes that, but I concealed the fact to prevent him from deriding her as well.

He asked me what I thought of the theory. I said I didn't know the facts but it was certainly possible.

When the Reverend Barnett hears something he doesn't like, he snickers. He did so now. Like Father Lezak, he complained about his congregation, many of whom were

thinking unpleasantly like our mothers-in-law. He explained that he is for liberty, but a parent has no right to educate his child any way he likes. I asked why it would be better for somebody other than the parent to decide. I said that he and I obviously disagreed, and asked whether it would be all right with him if *I* decided what *his* children should learn.

He snickered and explained that he was for equal rights for all people, and that it was important to avoid "simplistic solutions."

He defended the Reverend John Fry, another Presbyterian minister, who in June of 1968 was accused in a Senate investigation of permitting the Blackstone Rangers, a Chicago gang, to store sniper rifles, sawed-off carbines, hand-grenades, and other weapons – bought with "war on poverty" money – in his First Presbyterian Church. We are told that Fry also permitted the gang to smoke marijuana in the church; advised the members in an extortion racket yielding thousands a week; warned them to watch out for a police raid; and, once passed along a murder assignment. On June 24, 1968, Fry himself told the Senate Permanent Investigating Subcommittee that he had used money from the Chicago Presbytery to provide bond and legal counsel for indicted gang members.

But everything we have read in the newspapers about Fry is false, said Barnett. Indeed, he said, it was Fry who solved the problem of the weapons. The trouble we have been reading about was caused by the corrupt Chicago police. Fry's "solution" was to arrange a treaty between the police, federal authorities, and the gang – under which Fry locked the weapons in a vault in the church – and the corrupt Chicago police raided the church in violation of the treaty, said Barnett.

He didn't say why a gang which specializes in extortion and murder should be given the same status as the Chicago police, and dealt with by treaty like a foreign nation; and he didn't say why storing hand-grenades in a church vault is a *solution*. The good Reverend wouldn't admit actually knowing Reverend Fry, "but you hear things around the Presbytery."

Like Father Lezak, the Reverend Barnett saw the violence at the Democrat Convention and: "it took all I had, physically, to keep from throwing rocks at the police, myself."

I know you're sorry he said it. So am I. But those were the Reverend Barnett's exact words. And like Father Lezak, he recommended the *Walker Report*.

I said I was glad to hear he had actually read the *Report*, because I had read it too, so we both knew it contained statement after statement by the revolutionary leaders that they were specifically coming to Chicago to attack the police.

He snickered and said he was for equal rights for all people. He warned about those dangerous "simplistic solutions."

The Reverend Bruce Young had by now been gone long enough to do some research, and the telephone rang. When he hung up, the Reverend Barnett asked whether I didn't think the greatest danger to the country wasn't Communism, but such groups as The John Birch Society. He described in detail the seizure of Germany by Hitler and his Nazis; like Father Lezak, he was against them. And he talked at length against "the system" — ours. He said the problem isn't just that rotten individuals in it get authority, but that the system itself makes them rotten; which is why, he explained, the same corrupt situation will

prevail when Commander Fahey of the Nineteenth Police Division is replaced. He said we should "reorganize" the police department – indeed, the country. I asked repeatedly what he meant; except for the Communist solution of a civilian review board, which the Human Relations Committee of L.V.C.C. endorses, he would not exactly say.

But a "simplistic" answer was flickering in my mind.

Indeed, after a while, we got into the Nuccio case. And I told the Reverend Barnett that what bothered me was for instance the fact that Nuccio has a record of twenty-six Honorable Mentions, while Nelson had a record of several arrests, and according to the autopsy was an acute alcoholic.

That only proves the corruption of the system, said Barnett. It gave twenty-six Honorable Mentions to a murderer. I asked the good Reverend whether he meant that a man is guilty of a crime even before he commits it, and Barnett came out strongly for equal rights for all people. As for the autopsy, he said he believes the pathologist is lying. I asked him why and he explained that "Chicago is corrupt."

Unsuccessfully suppressing a smile, I reminded him that I was a professional journalist; said that I was covering a story, whatever the story was; that if the autopsy is a lie, I would definitely say so; that as a New Yorker, I was delighted to believe Chicago is corrupt – that, in fact, I do believe it; but that we would both look very stupid if I wrote that the pathologist is a liar because Barnett dislikes Chicago. I asked whether there is any *evidence* to support his charge.

He said there isn't – but that he believes it anyway.

I'm sorry all this is so remarkably amusing. But it is an exact narration of our conversation.

I asked the Reverend Barnett whether he saw any contradiction between his ridicule of the idea that the Communists killed King, which the evidence about the Communists makes believable; and his acceptance of the idea that the pathologist is conspiring, for which no evidence exists – and he sternly warned against "simplistic solutions."

What would you guess his reaction would be if I wrote here now that Barnett is a Communist, and that I have no evidence – except for his hatred of the police and our system, for instance – but we know for a fact that some other ministers are?

And finally there was the question of the knife. And I pointed out that it wasn't just something Officer Nuccio says was discovered, but that his testimony is corroborated by three other police officers and a businessman – who were on the scene and saw it.

Barnett snickered and said Mr. Citron is lying. He said he couldn't have seen Nelson playing with a knife, because the Franksville table he was sitting at can't be seen through the window. If this is true, I said thunderstruck, the defense is shaken, if not shattered.

"How do you know that?" I asked. "Have you looked for yourself?"

"Yes," said the Reverend Thurston Barnett.

Here at last was something I could check. So the next afternoon after seeing Father Lezak, I did so. I went behind the counter at Franksville, stood in Mr. Citron's footprints, and looked through the window.

I saw perfectly.

I saw everything: the table, the street, and Wrigley Field.

Indeed, if Barnett really did bother to look, he was even four or five feet closer – the width of the counter and the intervening space – his Presbyterian nostrils pressed to the glass; because Citron says Barnett has never been behind the counter.

"Only one other man has done what you just did," said Citron.

"Who?" I asked.

"Tully," he said.

"What did he say?" I asked.

"Nothing."

So when I looked through that window, I knew Barnett is lying. That is somewhat "simplistic," I realize – but it is the truth.

And I knew for sure that Officer Nuccio is innocent.

VI

So you see, what ran over Richard Nuccio is the Communist War On Police. Indeed, Chicago Police Intelligence has already established that what you have read here is just the proverbial scratch on the surface. And the purpose of the Communist War on Police, as always, is to demoralize, discredit, and destroy our independent, local police, so that Communists can impose their totalitarian dictatorship. One major part of the plan is the rioting run by Communists in the streets – which their allies in government forbid the police to suppress – to create the

impression that our local police are inadequate in training, manners, and capability. The other major part is the current attempt by conspirators in government to seize our local police – with the usual weapon of federal "aid" coupled with federal "guidelines" (that is, *controls*) inflicted by the new federal "anti-crime" law – allegedly to satisfy demands for "law and order."

The result, if successful, would be the same national police force, the same *gestapo*, Barnett and Lezak claim to be against. And it would produce the "law and order" of a totalitarian dictatorship – of a Nazi Germany – which they also claim to be against. Indeed, a national police force is a hallmark of a totalitarian dictatorship, isn't it? There couldn't be, and has never been, a dictatorship without one. Every totalitarian dictatorship needs a national police force just to keep itself in power – because it *is* a dictatorship. It makes no difference, to the victims, what color uniforms the dictators wear, what sort of concentration camps they run, or whether they call themselves Communists or Nazis – no difference at all.

So just because somebody claims to be against the Nazis doesn't mean he really is. In Communist fashion, he may simply be keeping alive the dead idea of Nazism with which to smear anyone who opposes Communism. No, the deciding factor is whether he supports or opposes what makes a Nazi Germany – and all other dictatorships – possible: concentration of power; totalitarian power. The crucial question is whether he supports or opposes the local, independent police forces which have kept America free.

The question arises: Why, then, are the Communists always calling for "local control" of our police? And the answer is that this is a typical demonstration of the Com-

munist principle of reversal. We *already have* local control. We're trying to keep it. If enough citizens to Chicago, for instance, are dissatisfied with their police, they can elect a different Mayor, with a mandate to appoint a Commissioner they prefer. The Communists, on the contrary, are trying to *discredit* local control – by associating it in your mind with the Communist terrorists demanding it for their agitators. As always, they are trying with perfect consistency to arrange by boomerang the *gestapo* they claim to be against.

And that is why, in this case, they chose so fine an officer as Richard Nuccio as the victim. Almost everyone wants a bad policeman punished; civilians do, and the police themselves do. A bad policeman does damage to his department. Punishing him protects the department and good, local law enforcement. But to punish a good policeman – the best, a man with twenty-six Honorable Mentions – in the name of "local control," and "good police-community relations," is to attack the system of which he is a part; to attack the local control one claims to endorse. And Nuccio just happened to get the short end of the nightstick.

What are you going to do about it?

Mayor Richard J. Daley has refused to see Mrs. Nuccio, but he had time the other day to see Hubert Humphrey, who calls himself the "biggest victim" of the Convention. Two Chicago Assistant Corporation Counsels warned Nuccio not to testify at the coroner's inquest, for fear what he said might jeopardize their defense against Communist-fronter Gertz. Nuccio obeyed and was charged with violation of Rule Number Fifty-One: refusing to testify at a coroner's inquest. Of course, the City did offer him one dollar – one – if he would sign an affidavit promising to

"release and waive any and all claims for salary, rights of action or causes of action which I have or may have against the City of Chicago, arising out of any thing done or left undone from the beginning of the world down to the signing of these presents . . . ." He refused.

And Frank Sullivan, director of public relations for the Police Department, told me in his office that as far as the Department is concerned the case is closed, "because the jury found Nuccio guilty." Sullivan publishes a magazine for and about Chicago policemen — but he doesn't even know that the first Chicago policeman to be found guilty of murder in fifteen years was convicted not by a jury but a judge.

So you see, it's up to you, as always — as it should be.

What are you going to do?

You don't have to do a thing, of course — not even one. It's still a free country, if you will pardon the expression. But you see, the Nuccio case is doing what it was designed to do: demoralizing and embittering his fellow officers. If you don't, there may come a time — it is no longer an "extreme" joke to say this — when you will want a policeman, desperately, and no one will show up. And if you survive, you may soon find yourself living under a totalitarian dictatorship which would make the reign of Caligula seem like the Jefferson Administration.

So if you do nothing now, how long do you plan to wait?

Indeed, how long do Nuccio's fellow officers plan to wait? There are those trying to spread the word around the Department that Richard Nuccio is a wrong cop. But you

have read the truth here. Where is he wrong? And by the way, police officers of Chicago, have you wondered where that raise you are now enjoying comes from? From the federal government, doesn't it? – which makes you federal employees – because he who pays the piper has the right to call the tune. Are you willing to be turned gradually into part of a national police force – with all that means? And if you aren't, the question is still how long you plan to wait. How much closer does it have to come? To the point at which you, too, are boobytrapped like Nuccio?

Richard Nuccio is twenty-seven years old. His ambition was always to become a policeman. For seven years, before he succeeded in December, 1966, he was a clerk and mailman for the U.S. Post Office. Today he lives with his wife and three small children in a $100-a-month apartment, in a building you enter from an alley. So he isn't exactly an Imperialist Exploiter. He lives in the area he patrolled. Apparently he had about the same breaks as the hoodlum Nelson. Indeed, first-class attorneys like Nuccio's do not come for free. His case has already cost him about $10,000, collected in donations from fellow officers and in loans from friends and relatives; and his appeal, now being filed, will cost him $5,000 more. I suppose he could have gone on Welfare, but since his suspension he has been working at construction and minor mechanical work.

His wife is not the career girl type. Apparently she spends most of her time in the kitchen plotting to ruin Nuccio's figure. She will have a hard life if you let her husband do time. And the sentence, remember, is fourteen to fifteen years. Indeed, the other inmates of a prison always brutalize a convicted policeman – especially today. So suppose that Nuccio is seriously injured or even that he

doesn't come out alive. Some of you responsible, mature, industrious and humane teenagers who saw no knife at Franksville that night may not yet have thought of that. It may not have occurred to some of you who saw what happened that night but haven't testified. And of course if it happens there will be no going back. Years later, some of you may wish to, but there will be no going back. So maybe Nelson was the wrong guy the facts say he was, after all. Indeed, I would bet that if you think about it hard enough, somebody will remember that knife – which would prove you are the adult you claim to be.

In fact, maybe this hasn't occurred to you either, but the elderly schemers over twenty-five who got you into all of this have been playing you for suckers – just as they did the teenagers in Cuba, China, Russia, and Czecho-Slovakia, before they grabbed those countries and wiped out all rights.

As we have seen, it was publicity and organization that led to Richard Nuccio's conviction. And it is only publicity and organization that can lead to his release. Now is the time for you, the people, united, to speak. And you might begin by demanding answers to some interesting questions:

Who decided to prosecute Officer Richard Nuccio, and why?

Who is trying to prevent prosecution of Austill, and why?

Who is Father Lezak's friend in the office of the State's Attorney?

Did they have any interesting discussions about this case?

Who are the others involved we still know nothing about?

Why won't Mayor Daley see Mrs. Nuccio?

Why wasn't Officer Rothmund called to the Grand Jury?

Why wasn't Officer Hyatt called to the Grand Jury?

Why is the Reverend Barnett lying?

One thing already stands out clearly: Richard Nuccio is innocent. *He must be freed.*

No. 82-994

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT WELCH, INC.,

Petitioner,

vs.

ELMER GERTZ,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Virtually none of the Questions Presented as posed by Petitioner herein were raised in the Courts below. Furthermore, the questions presented by Petitioner are not based upon the record as actually made below, but upon a distorted and biased view of the evidence in this case, as well as a distorted view of the opinion of the Court of Appeals to which this Petition for Writ of Certiorari is directed.

The following are the questions actually presented in this case:

1. Whether Petitioner has waived the right to raise the issues set forth in its Petition for Writ of Certiorari by either failing to raise them in the Courts below, or by taking a directly opposite position below to that taken before this Court.

2. Whether the self-serving statements of a defendant may insulate it from liability in a defamation case where the objective evidence shows that any person would have had reason to doubt the veracity of the damaging and harmful statements made by a publisher in undue haste after having conceived the story line itself, carefully selected an author known for his propensity to label persons as Communists or Communist-fronters and then furnishing the author with information to be used as the basis for the story.

3. Whether a publisher may be held to be responsible for the writings of an allegedly free-lance author whose writings it has published regularly for several years, and for whose honesty and accuracy it specifically endorses without any basis for doing so.

4. Whether the evidence supports the findings below that a publisher who accuses a person of a crime and of having a criminal record may avoid liability by purporting to cloak those accusations in political hyperbole.

5. Whether Respondent's evidence was sufficient to support the jury's verdict, as upheld by the District Court and the Court of Appeals that Petitioner was guilty of both negligence and actual malice.

6. Whether this Court intended to foreclose Respondent from proving actual malice on the part of Petitioner when it remanded this cause for a new trial in its prior decision herein.

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In The

Supreme Court of the United States

October Term, 1982

ROBERT WELCH, INC.,

Petitioner,

vs.

ELMER GERTZ,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This Court has previously rendered an opinion in this case. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997 (1974). There, this Court held that Plaintiff was not a public figure, but a private individual. The Court also held that the individual states were free to define for themselves the appropriate standard of liability for a publisher of defamatory falsehoods injurious to a private individual so long as they do not impose liability without

fault, but that in order to obtain punitive damages, the plaintiff will be required to show actual malice as defined in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964). *Id.* at 348, 94 S.Ct. at 3010.

In its prior opinion, this Court recognized that the actual injury for which Plaintiff could recover damages was not limited to out-of-pocket loss, but included impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. *Id.* at 351, 94 S.Ct. at 349. This Court has already recognized that the article and reprint thereof at issue in this case falsely accused the plaintiff of having committed crimes, having had a criminal record and being a Leninist and a Communist fronter, as well as other highly derogatory things and that it was defamatory. The Court also recognized that there were serious and harmful inaccuracies in the statements regarding Plaintiff in that article.

The Court concluded its opinion as follows:

> "We therefore conclude that the *New York Times* standard is inapplicable to this case and that the trial court erred in entering judgment for Respondent. Because the jury was allowed to impose liability without fault and was permitted to presume damages without proof of injury, a new trial is necessary. We reverse and remand for further proceedings in accord with this opinion." *Id.* at 353, 94 S.Ct. at 3013.

After the remand from this Court, Plaintiff filed an amended complaint in the District Court in accord with this Court's prior opinion, alleging that Defendant was guilty of both negligence and actual malice, specifying, among other things, that the defendant had made no effort whatsoever to check the accuracy of any of the highly damaging statements made about him prior to publication, although it had more than ample time to do

so, since American Opinion is a monthly publication, and that it was in an excessive hurry to publish and distribute the article and reprint thereof; Defendant's managing editor vouched for the accuracy of the article although he had no knowledge upon which to base such an assertion and should have been alerted to investigate because of the nature of the charges; Defendant's managing editor himself placed defamatory captions in the article; and Defendant continued to distribute the reprints in the magazine itself containing the article after this suit was instituted and after it had been put on notice of the falsity of the statements within it. Plaintiff prayed for both compensatory and punitive damages. Defendant did not oppose or object to this amendment in any way.

After remand, at the District Court level Defendant never objected to Plaintiff introducing evidence of actual malice on its part. To the contrary, Defendant filed a Motion for Summary Judgment prior to trial, attempting to demonstrate that Plaintiff would be unable to prove actual malice as a matter of fact at trial. It did not contend that Plaintiff was precluded from offering evidence on the issue, only that there were insufficient facts available to establish actual malice. At no time either prior to or during the second trial of this cause, did Defendant contend that Plaintiff was foreclosed from proving actual malice. Nor did Defendant raise the issue in its post-trial motion. Indeed, during the trial, Defendant urged that Plaintiff was required to prove actual malice and expressly urged the court to instruct the jury that Plaintiff bore this burden. (Tr. 637, 639)

The evidence introduced at the second trial went far beyond that introduced at the first trial of this cause. There were additional important witnesses, and those who testified a second time greatly expanded their testimony. Alan Stang, author of the article, testified ex-

tensively at this trial, whereas he had not testified at all at the first trial. He admitted having written that the Democratic Party of the United States is a Marxist organization and that Hubert Humphrey, Pierre Trudeau, Richard Nixon, Dr. Martin Luther King, Jr., John F. Kennedy, Lyndon Johnson, John Foster Dulles and U Thant were all Marxists or working for the Communists. (Tr. 205, 211-12, 216-17, 418) He further stated that when he was first contacted by Scott Stanley, the managing editor of Defendant, it was Stanley who told him that Officer Nuccio, about whom the article was being written, was being railroaded for murder and asked him to go to Chicago to research and write about the matter to demonstrate this. Stanley supplied Stang with a package of material on Communist attacks on the police before Stang began to research and write on the article. As the opinion of the Court of Appeals states, Stanley conceived of the story line and solicited a writer with a known and unreasonable propensity to libel persons or organizations as Communists to write the article and never made any effort whatsoever to check the accuracy of the defamatory statements made by Stang.

Stang admitted that he never checked any of his charges against Plaintiff with anyone having knowledge of the facts. He did not even question Nuccio's attorneys or the Plaintiff about them. In fact, he admitted that despite his charges against Plaintiff he actually knew that Plaintiff had nothing whatsoever to do with the criminal prosecution of Richard Nuccio. (Tr. 607).

Scott Stanley again testified, admitting that he rushed the article into print within three hours after having received the manuscript from Stang, contrary to the usual procedure which took days. He claimed that he

relied solely upon Stang for the matters stated in the article, but he personally wrote the accusatory title, the defamatory captions for the photographs and personally and on behalf of the Defendant claimed Stang to be their own and vouched for the accuracy of Stang's "facts" although he had absolutely no knowledge of whether they were true or not. (Tr. 116) There were many reasons why Stanley should have been alerted to the defamatory falsehoods in the article. For example, Gertz had been director of public relations for the Illinois Police Association, as disclosed in the material in Defendant's possession. Both Stang and Stanley admitted at trial that they fully intended to depict Plaintiff in a bad light.

Several persons well-acquainted with Plaintiff testified at this second trial, each stating that to accuse an attorney of being affiliated with Communists and conspiring to frame an innocent man for the crime of murder would inevitably damage his reputation. In addition, the plaintiff himself testified that as a result of this article, he was shocked, deeply upset, worried about the effect of the article, knocked out emotionally, anguished, humiliated and embarrassed. He testified that he became obsessed with the article and devoted countless hours to trying to rehabilitate himself and redeem his reputation. (Tr. 290, 291, 306 and 307) He felt physically and emotionally ill at ease and took tranquilizers as a result of this article. (Tr. 314, 349)

The jury returned a verdict in favor of Plaintiff in the amount of $100,000.00 actual damages and $300,000.00 punitive damages. Judgment was entered on that verdict.

The only issues raised in Defendant's post-trial motion were that the Court had confused the standards of negligence and actual malice; there was insufficient evidence to prove negligence, malice or actual damages; it was

error to allow Plaintiff's counsel to argue that the statements made about Plaintiff were untrue; the damages were excessive; and the Court improperly allowed the jury to read the article at issue prior to final deliberations. The trial court denied this motion in every respect and refused to grant a remittitur.

In a lengthy and scholarly opinion, the United States Court of Appeals for the Seventh Circuit affirmed the judgment in favor of Plaintiff in all respects after considering in depth all of the contentions and arguments raised by Defendant. The Court of Appeals specifically endorsed many of the findings of fact below, all based upon the record and all justifying the jury's verdict. Defendant now seeks to contradict these findings on the basis of its own distorted version of the facts which was rejected by the jury and both courts below. For example, Defendant persists in referring to Stang as a freelance writer, despite the fully supported finding that he was, in fact, the agent of Defendant, which is therefore bound by his conduct and numerous writings for it.

ARGUMENT

I.

DEFENDANT HAS WAIVED ITS RIGHT TO RAISE THE ISSUES PRESENTED TO THIS COURT

None of the issues which Defendant purports to advance to this Court were raised at the trial court level. One, pertaining to the law of the case, was raised for the first time before the Court of Appeals and decided adversely to Defendant. The rest are presented to this Court for the first time. Thus, the threshold issue in this case now is whether Defendant has any right to present new issues to this Court which were not raised in more than thirteen years of litigation. It is one of the basic rules, founded upon both common sense and judicial economy, that a party may not raise for the first time on appeal a ground not presented at the trial level. *Pstragowski v. Metropolitan Life Ins. Co.*, 553 F.2d 1 (1st Cir. 1977)

A party may not allow the case to be submitted to the jury on one theory and then object to it as a new ground on appeal. For this reason, it has long been required that all contentions first be raised at the trial level. None of the issues which Defendant purports to raise were ever presented to the District Court. Having failed to do so, Defendant is now precluded from asking this Court to consider matters which were never presented to the courts below. The Petition filed here by Defendant is the last desperate act of a guilty defamer to prolong litigation which is already much too old.

In addition, nothing presented in Defendant's Petition for Certiorari demonstrates that there are any special and important reasons for granting the Writ as required

under this Court's Rule 19. There is no demonstration that the opinion of the Court of Appeals in this case is in conflict with the decision of another Court of Appeals or with any decision of this Court. Indeed, it is in conformity with such decisions. Nor are there any important novel questions raised in this case which have not already been adequately explored and authoritatively decided by this Court. The facts and the law are overwhelmingly in Plaintiff's favor.

This Court should deny the Petition for Certiorari.

II.

DEFENDANT WAS GUILTY OF ACTUAL MALICE

Defendant's argument that the Court of Appeals applied the wrong standard of actual malice is totally without foundation. Defendant argues as if the Court of Appeals decided the issue of actual malice for the first time. Defendant completely ignores the fact that the jury was instructed that the burden was upon Plaintiff to prove actual malice by clear and convincing evidence. Actual malice was properly defined to the jury in those instructions. Defendant at no time objected to the instructions given to the jury, either at trial or thereafter. Thus, the opinion of the Court of Appeals did nothing more than to affirm the finding of malice by the jury which was instructed properly on that issue and heard more than sufficient evidence to justify its finding of malice.

Defendant's argument that this Court has mandated that actual malice must be judged by a subjective standard alone is a perversion of the holdings of this Court. It has never endorsed the approach submitted by Defendant here. To do so would allow every defamation defendant to insulate itself from liability by merely stating in conclusory language that it had reason to believe the truth of

the matter and had no information that the defamatory material might be false. In fact, this Court rejected such an approach in *St. Amant v. Thompson*, 390 U.S. 727, 732, 88 S.Ct. 1323, 1326 (1968), where it said:

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Profession of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports."

As set out at great length by the Court of Appeals in its opinion, Defendant falls squarely within this caveat. The story was fabricated, based wholly on unverified anonymous information, and so inherently improbable that only a reckless man would have put it in circulation. The facts of this case as proved at the trial show an egregious violation of Plaintiff's rights by this Defendant. Nothing in the opinion of the Court of Appeals contravenes this Court's prior holdings.

There are no issues of import in regard to the standard of actual malice utilized by the courts below in this case. In short, Defendant is merely asking this Court to review the weight of the evidence and to reach a finding in opposition to that of the jury, the District Court, and the Court of Appeals. No purpose would be served in doing so when it is obvious that the finding of actual malice is more than amply supported by the evidence in this case.

III.

THE AUTHOR'S CONDUCT WAS PROPERLY CONSIDERED

Defendant next complains that the Court of Appeals improperly attributed the conduct of the author to the Defendant. This argument is based upon a deliberate distortion of the opinion of the Court of Appeals. While footnote 19 of the opinion of the Court of Appeals recognizes that the conduct of the author is attributable to the Defendant because, among other things, it solicited him to write the article, gave him its conclusion in advance and gave him the storyline and background material, that is not the only basis for the finding that Defendant was guilty of actual malice. The court specifically finds that the Defendant, through the actions of its managing editor Stanley, was itself guilty of actual malice. All of this is spelled out in persuasive detail in the Court of Appeals opinion and was amply proved at the trial.

The Court of Appeals recognized, as the jury found, that Stanley had obvious reasons to doubt the veracity or accuracy of the author of the highly defamatory statements, originated the idea and central theme of the article, and provided material which found its way into the article. Furthermore, Stanley himself admitted that he had no basis at all upon which to support his personal and corporate endorsement of the truth of the material contained in the article written by his man. In fact, he had reason to know that Stang, regardless of the facts, would brand anyone about whom he wrote a Communist, due to his long association with and prior editing of similar articles written by Stang. Indeed, the evidence in this case provides a textbook example of reckless disregard of the truth by both author and publisher.

The opinion of the Court of Appeals fully discusses that evidence and need not be reviewed by this Court.

IV.

THE ARTICLE AT ISSUE IS DEFAMATORY

In arguing that the article here is not defamatory, Defendant completely ignores the prior holding of this Court in this case and the very language of its charges against Plaintiff. That the article involved herein is defamatory is truly the law of the case. At the very beginning of this case, Defendant moved to strike the complaint on the grounds that the statements contained in the article at issue were not defamatory. In the very first of several published opinions in this case, the District Court held that the statements made about Plaintiff "impute to him a want of the requisite qualifications to practice law . . . and are therefore actionable per se." *Gertz v. Robert Welch, Inc.*, 306 F.Supp. 310, 311 (N.D. Ill. 1969) From that date, until the filing of the Petition for Certiorari in this case, there has been no serious argument made by Defendant that the article herein is not defamatory. That argument has long since been waived. In fact, Defendant's attorney admitted at the first trial that the accusations that Plaintiff was a Communist or Communist fronter were false. Indeed, the prior opinion of this Court herein forecloses that issue from consideration.

The article at issue here did not merely link Plaintiff with some political ideology. Rather, it accused him, among other false and defamatory charges, of having had a criminal record and having participated in the crime of causing an innocent person to be convicted of murder.

If one issue has been clear since the beginning of the long and tortuous process of this suit, it is that the article at issue is defamatory of the Plaintiff. It cannot seriously be contended at this late date, after two trials and three appellate opinions, that the case should have been dis-

missed in the first place. No issue whatsoever is presented regarding the false and defamatory nature of the accusations against Plaintiff which would justify this Court's consideration of such a basic issue in this case at this late date, more than thirteen years after the filing of suit and the holding of two trials and three reviews thereof.

V.

THERE WAS AMPLE PROOF OF INJURY TO PLAINTIFF

In arguing that Plaintiff has proven no actual injury, the Defendant completely ignores the holding of this Court in its prior opinion herein. The evidence presented of the actual damage suffered by Plaintiff as a result of this article specifically tracks such damages in the manner and substance found to be proper and appropriate by this Court. As set forth in the Statement of the Case and found by the Court of Appeals, the Plaintiff testified eloquently as to the personal anguish, humiliation, pain, suffering and physical effects of this article upon him. Several attorneys, long active in leadership roles at the Bar, testified that the statements made about Plaintiff were bound to cause serious damage to Plaintiff's reputation. Indeed, there was direct testimony by Mr. Albert Jenner that he had personal knowledge of the damage to Plaintiff's reputation including the repetition of the libel.

There is no issue worthy of consideration by this Court regarding the nature of the proof of actual damage suffered by Plaintiff as a result of the actions of this Defendant.

VI.

PLAINTIFF WAS ENTITLED TO PROVE ACTUAL MALICE

Defendant renews here its unmeritorious contention, raised in the Court of Appeals for the first time, that the law of the case precluded Plaintiff from presenting evidence of actual malice at the second trial of this cause. This argument is premised upon the finding by this Court in its prior opinion in this case that Plaintiff had not proven actual malice at the first trial. Be that as it may, it is obvious that had this Court intended to hold that Plaintiff had no opportunity to do so at a retrial of this cause, the case would not have been remanded for a new trial. It is logical that if this Court intended to hold that Plaintiff could never prove actual malice, whatever the evidence, it would not have reversed and remanded the case for a full trial, but would have included in its mandate a statement that only actual damages could be recovered at retrial. No such holding was made. Indeed, the Court set forth specific guidelines as to how actual malice was to be proven, for guidance at the retrial of the case. It is clear from this Court's prior opinion that the matter was sent back for a complete trial of all issues under the new guidelines set forth by it for the first time. As a result, Plaintiff made appropriate amendments to his complaint as to both negligence and actual malice and offered an abundance of evidence to support those allegations, going far beyond the evidence offered at the first trial.

Furthermore, Defendant has completely misconstrued the doctrine of law of the case. That doctrine applies only to issues of law which have previously been determined, not to issues of fact. *Petersen v. Federated Development Co.*, 416 F.Supp. 466, 473 (S.D.N.Y. 1976), *In Re Staff Mortgage and Investment Corp.*, 625 F.2d 281, 283 (9th

Cir. 1980). Thus, the doctrine upon which Defendant relies clearly does not apply to this situation, as the Court of Appeals correctly found.

This Court made no findings of fact in its prior opinion, other than to affirm the finding at the first trial that Plaintiff was not a public figure and that false statements were made about him. All other issues of fact were open for retrial and reconsideration. Defendant so recognized at the trial. Having fully participated in that trial and having argued at the District Court level that Plaintiff was required to prove actual malice, it cannot now do an about face and contend that Plaintiff was foreclosed from proving that which Defendant insisted he must prove.

CONCLUSION

This case presents no issues requiring the attention of this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 82-994

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT WELCH, INC.,
Petitioner,

v.

ELMER GERTZ,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

ARGUMENT

I. INTRODUCTION

The Respondent's brief in opposition is little more than general assertions without citation to the decision below, case authority or the record itself. When the Respondent does attempt once to set forth a specific legal argument, concerning the standard for proving actual malice, he demonstrates that the decision below clearly conflicts with prior decisions of this Court (Opp. at 8-9 [1]), as is shown *infra.*

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[1] "Opp." refers to Respondent's Brief in Opposition.

II. THE ISSUES IN THE PETITION WERE PROPERLY RAISED BELOW

Without any analysis, the Respondent asserts *ipse dixit* that the issues in the petition were not raised below. (Opp. at 7-8.) Yet earlier in his brief, the Respondent admits that at trial the Petitioner raised the issues of the confusion of "the standards of negligence and actual malice; [and] that there was insufficient evidence to prove negligence, malice or actual damages." (Opp. at 5.) This admission, and even a perfunctory reading of the decision below, shows that Respondent's argument that the issues in the petition were not raised below is meritless.

Specifically, Questions 1, 2 and 3 raised in the petition each clearly relate to proof of actual malice, including the standard by which it must be proven. Moreover, the opinion below addresses each of these questions: Question 1, *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 537-38 (7th Cir. 1982) (App. 21a-23a [2]); Question 2, *id.* at 539 n. 19 (App. 25a n. 19); Question 3, *id.* at 538-40 (App. 23a-26a). Likewise, during the instruction conference, the trial judge stated that he "recognizes that the defendant objects to the opportunity for the jury to award punitive damages." (Tr. 650.)[3]

Question 4 relates to the evidence necessary to establish actual damages, which, as noted, Respondent admits in his brief was raised below. Again, the Court of Appeals

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[2] "App." refers to the Appendix to the Petition for a Writ of Certiorari.

[3] The Respondent is disingenuous when he argues that the Petitioner did not object to the actual malice instruction and thus to the possible award of punitive damages. (Opp. 3.) At that point the Petitioner had successfully urged that a conditional privilege was applicable and that it could be overcome only by a showing of actual malice. *Gertz v. Robert Welch, Inc.*, 680 F.2d at 534 (App. 13a-14a).

also considered this issue. *Gertz v. Robert Welch, Inc.*, 680 F.2d at 540 (App. 26a-27a).

With respect to Question 5, concerning application of the "law of the case," the Court of Appeals stated as follows: "Because the law of the case doctrine as it applies to this case is not merely advisory, but is binding on the court on remand, we deem it necessary to examine this issue." *Id.* at 531 n. 3 (App. 8a n. 3). Furthermore, the Court of Appeals held that "if Welch is correct about the law of the case issue, it would be dispositive of this case . . . ." *Id.* at 532 n. 4 (App. 8a n. 4).

Thus, all Petitioner's questions were raised below and Respondent's "waiver" argument is without foundation.

Lastly, the Respondent pointlessly argues about whether the article was defamatory. (Opp. at 11-12.) Regardless of whether portions of the article were defamatory, the issue is whether the Court of Appeals improperly relied on the author's political views as placing the publisher on notice that the author was supposedly unreliable, especially when the publisher agreed with those political views.

III. RESPONDENT REPEATEDLY HAS MISSTATED THE FACTS BELOW

Respondent accuses the Petitioner of having set forth a "distorted" version of the facts." (Opp. at 6.) As will be seen below, the one fact which Respondent offers, Mr. Stang's status as a freelance writer, is readily supported by the record, including the statements of Respondent's own counsel.

Respondent's brief, on the other hand, contains numerous misstatements of fact. He made these same misleading statements in his brief before the Seventh Circuit and has consistently done so throughout this litigation. Much of the Respondent's brief is keyed to these misstatements. However, for the sake of brevity, this reply refers only to five examples.

1. It is self-contradictory for the Respondent now to claim that Mr. Stang was not a freelance writer. (Opp. 6.) Until the second Court of Appeals found it necessary to call Mr. Stang the Petitioner's agent in an attempt to bolster its holding on actual malice, *Gertz v. Robert Welch, Inc.*, 680 F.2d at 539 n. 19 (App. 25a n. 19), the Respondent did not question Mr. Stang's freelance status. At trial, counsel for the Respondent put it well in arguing an evidentiary point:

> MR. GIAMPIETRO: . . . [T]hey have maintained that he [Mr. Stang] is totally free lance. He was off on his own, did whatever he did on his own . . . .
>
> I don't think that they have a right to go into anything that Mr. Stang did, other than the fact that he wrote the article.
>
> * * * *
>
> It seems to me it's highly prejudicial to the plaintiff for them to go into these things [the research material looked at by Mr. Stang] *because it's going to divert the jury from the issues in the case, which is the action of the defendant, not Mr. Stang.* (Tr. 464 (emphasis added).)[4]

2. Unable to point to any direct and competent evidence of damages, the Respondent has argued that Mr. Albert Jenner gave direct testimony about damage to Respondent's reputation. (Opp. at 12.) Mr. Jenner testified only that he had not read the article and did not know its contents (Tr. 149), but that he had overheard general con-

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[4] The trial court ruled that Mr. Stang could not be asked about the contents of any documents upon which he relied because that would divert the jury from its "mission in this case, and that is the question of determining whether any negligence existed." (Tr. 466.) The trial court specifically prohibited questioning directed to Mr. Stang's "thought process" (Tr. 467), which it clearly would not have done if that process were in issue. Under Herbert v. Lando, 441 U.S. 153 (1979), the "thought process" of any person claimed to have acted with actual malice must be the focus of a defamation trial, especially when, as here, punitive damages are sought.

versation from unknown persons at his "wife's parties" and elsewere that "[s]omething about Communism" had been said by "some magazine, or book, or I don't know what it was" and that the plaintiff "lost respect among the community generally." (Tr. 151-52.) Nevertheless, Mr. Jenner testified, the plaintiff's reputation among his friends remained high. (Tr. 151.) Such speculative testimony, which did not even identify the publication which Mr. Jenner claimed was the subject of the conversations he overheard,[5] clearly does not meet the standards of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (*"Gertz I"*).

3. Respondent's assertion that Mr. Stanley told Mr. Stang that Officer Nuccio was being "railroaded" (Opp. at 4) is a gross distortion of the record. The cited testimony was that Mr. Stanley sent "Mr. Stang to Chicago to find out whether Mr. Nuccio was being railroaded" as several persons had indicated, which is quite a different thing. (Tr. 187-88, 417-18, 603-04.)

4. Petitioner denies that Mr. Stang's actions are relevant here, since he was a freelance writer and his actions thus are not attributable to the Petitioner. However, if they are to be considered, it must be noted that Respondent is incorrect in his argument that Mr. Stang was negligent because he never checked with Mr. Nuccio's attorneys or any other knowledgeable persons. (Opp. at 4.) In fact, Respondent's own counsel argued to the jury that Mr. Stang talked with "two of the lawyers involved in the case . . . the prosecutors," (Tr. 676), and the testimony was that Mr. Nuccio's lawyer told Mr. Stang that no one else would talk with him (Mr. Stang). (Tr. 611-12.)

5. Respondent also errs in stating that Mr. Stanley "rushed the article into print . . . contrary to the usual

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[5] For example, it may have been reports about this lawsuit rather than the *American Opinion* article which engendered the reported comments.

procedure . . . ." (Opp. at 4.) Mr. Stanley testified that there was nothing unusual about the way the article was edited or set into print (Tr. 107) and that he was not trying to meet a deadline because "[i]f we hadn't gotten it done in the time we got it done, why we would have held it . . . it's not the end of the world." (Tr. 108.)

IV. THE EXISTENCE OF ACTUAL MALICE MUST BE ESTABLISHED UTILIZING A SUBJECTIVE STANDARD

Respondent, in his opposing brief, correctly recognizes that an important issue in this case is whether an objective standard should be utilized in determining the existence of actual malice. However, he misunderstands the law. He states:

> Defendant's argument that this Court has mandated that actual malice must be judged by a subjective standard alone is a perversion of the holdings of this Court. It has never endorsed the approach . . . .

(Opp. at 8.)

In fact, that is precisely the approach endorsed by this Court. In *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), this Court stated:

> [C]ases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant *in fact* entertained serious doubts as to the truth of his publication. (Emphasis added.)

In its first opinion in this case, this Court characterized *St. Amant* as "equat[ing] reckless disregard of the truth with *subjective* awareness of probable falsity." *Gertz I*, 418 U.S. at 335 n. 6 (emphasis added). And in *Herbert v. Lando*, 441 U.S. at 160, this Court stressed that "*New*

York Times and its progeny made it essential to proving liability that the plaintiff focus on the conduct and state of mind of the defendant." Thus, despite Respondent's contention, this Court has emphasized that actual malice must be judged by a subjective standard. This is what the court below failed to do, thus putting its decision in conflict with holdings of this Court.

As Respondent notes, mere "[p]rofession[s] of good faith," *St. Amant v. Thompson*, 390 U.S. at 732, will not suffice to prove lack of actual malice, but that is not the issue here. It is not statements of good faith by the editor that the second Court of Appeals ignored, but his *state of mind*, his conviction that he was dealing with an accurate, honest, reasonable author whose opinions were believable. The editor had no " 'obvious reasons,' " *Gertz v. Robert Welch, Inc.*, 680 F.2d at 538, in his *own* mind to doubt the article's or author's veracity, which is the *subjective* test of actual malice required by this Court and not considered by the court below.

V. THE DOCTRINE OF LAW OF THE CASE PRECLUDED RESPONDENT FROM ATTEMPTING TO PROVE ACTUAL MALICE

Respondent argues that the doctrine of law of the case does not apply here because, even if this Court held (as it did) that Respondent failed to prove actual malice, it did not foreclose Respondent's opportunity to prove it at the retrial. That is incorrect; this Court did foreclose that opportunity.

This Court has held that to be awarded punitive damages against a media defendant in a defamation action, a plaintiff must prove actual malice. *Gertz I*, 418 U.S. at 350. But since this Court also ruled that the actual malice standard was not applicable to this case, *id.* at 352, Mr. Gertz could not be awarded punitive damages. Therefore, remand could have been only for determining

the extent of both fault and actual injury,[6] elements peculiar to compensatory, not punitive, damages. If this Court believed Respondent had proved actual malice at the first trial, it would have reinstated the jury's award of $50,000. This would have been permissible because *Gertz I* stated that presumed damages could be awarded if actual malice were shown. *Id.* at 349. This is yet another indication that the Court held actual malice had not been proven at the first trial.

Mr. Gertz claims that if this Court did not intend to allow him to prove actual malice at the second trial, it would not have remanded. To the contrary, this Court specifically held that "the *New York Times* standard is *inapplicable* in this case." *Gertz I*, 418 U.S. at 352 (emphasis added). Thus, actual malice was not a factor on remand. That was the correct assessment before the second trial court held that the publisher's conditional privilege made it necessary for Mr. Gertz to prove actual malice in order to be awarded even compensatory damages, a holding acknowledged by the second Court of Appeals. *Gertz v. Robert Welch, Inc.*, 680 F.2d at 534 (App. 14a).

However, three courts—the first trial court, the first Court of Appeals, and this Court—all agreed that, despite being given every opportunity to do so, Mr. Gertz failed to prove actual malice on the publisher's part. Such a finding by this Court was binding on the second trial court and the second Court of Appeals. Since the court below agreed that " 'a mandate is controlling as to matters within its compass,' " 680 F.2d at 532 (App. 10a), under the doctrine of law of the case that finding should have been "dispositive of this case." *Id.* at 532 n. 4 (App. 8a n. 4).

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[6] "Because the jury was allowed to impose liability without fault and was permitted to presume damages without proof of injury, a new trial is necessary." *Gertz I*, 418 U.S. at 352.

CONCLUSION

For the foregoing reasons and those stated in the Petition for a Writ of Certiorari, the writ should be granted.

Respectfully submitted,

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